Supreme Court, U.S.
FILED
JUL 30 2010
OFFICE OF THE CLERK

No. 08-1314

In The
Supreme Court of the United States

DELBERT WILLIAMSON, *et al.*,

Petitioners,

v.

MAZDA MOTOR OF AMERICA, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division Three

JOINT APPENDIX

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July 2010

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Petition For Writ Of Certiorari Filed April 22, 2009
Certiorari Granted May 24, 2010

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131 388

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Order of the Supreme Court of California Denying Petition for Review, filed Feb. 11, 2009 .....App. 31

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ORANGE COUNTY SUPERIOR COURT

CASE NUMBER: 04CC06494

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02-AUG-2004	4	PROOF OF SERVICE – SUBSTITUTED WILLIAMSON, DELBERT
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17-SEP-2004	9	PROOF OF SERVICE WILLIAMSON, DELBERT
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06-NOV-2006	119	MIN ORD HEARING OFF CALENDAR

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27-APR-2007	127	REQUEST FOR DISMISSAL – PARTIAL W/PREJUDICE WILLIAMSON, DELBERT
18-JUN-2007	128	STIPULATION AND ORDER WILLIAMSON, DELBERT

California Court of Appeal
4th Appellate District Division 3
Case Number G038845

Date	Description	Notes
06/22/2007	Notice of appeal lodged/received.	Appellants' Delbert Williamson, et al.
06/29/2007	Civil case information statement filed.	
07/11/2007	Notice to reporter to prepare transcript.	CSR: K. Rex

08/08/2007	Reporter's transcript filed.	R-1
08/08/2007	Notice per rule 8.124 – with reporter's transcript.	Filed in superior court 6/21/07.
09/05/2007	Requested – extension of time	
09/06/2007	Stipulation of extension of time filed to:	Stipulation granted for all briefs. AAO due 11/6/07, RB due 90 days thereafter and ARB due 80 days.
10/22/2007	Appellant's appendix and opening brief filed.	Plaintiff and Appellant: Williamson, Delbert Attorney: David J. Bennion Attorney: David Lira Plaintiff and Appellant: Williamson, Alexa * * * SEE STIPULATION OF 9/6/07 FOR NEXT BRIEF SCHEDULE * * * (2) vols. appendix.

01/18/2008	Requested – extension of time	
01/18/2008	Granted – extension of time.	
03/06/2008	Respondent notified pursuant to rule 8.220(a)(2).	
03/18/2008	Requested – extension of time	
03/18/2008	Granted – extension of time.	2nd ext – rb ext'd to 4/1/08
04/03/2008	Respondent's brief	Defendant and Respondent: Mazda Motor Corporation Attorney: Brian Takahashi Defendant and Respondent: Mazda Motor of America, Inc. Attorney: Brian Takahashi Constructively filed 4/1/08 – Overnite Express
04/03/2008	Argument letter sent.	

04/03/2008	Request for judicial notice filed.	by respondents w/1 vol exhibits submitted separately (exhibits received only)
04/10/2008	Request for oral argument filed by:	atty. David Lira counsel for aplt. Time estimate 30 minutes.
04/14/2008	Request for oral argument filed by:	Atty Robert s. Robinson counsel for resp. Time estimate – 20 mins.
04/15/2008	Appellant's reply brief.	Plaintiff and Appellant: Williamson, Delbert Attorney: David Lira Plaintiff and Appellant: Williamson, Alexa Attorney: David Lira
04/15/2008	Case fully briefed.	
04/29/2008	Application to file amicus curiae brief filed by:	Product Liability Advisory Council, Inc. by law firm of Snell & Wilmer in support of the respondent/Mazda Motor Corp.
04/29/2008	Application to file amicus curiae brief filed by:	The Alliance of Automobile Manufacturers, Inc. in support of respondents

		Mazda Motor Corporation, et al.
04/29/2008	Application filed to:	by atty Adam C. Sloane to appear as pro hac vice for a/c Alliance of Automobile Manufacturers, Inc.
04/29/2008	Application filed to:	application by atty Erika Z. Jones to appear as pro hac vice for a/c Alliance of Automobile Manufacturers, Inc.
05/16/2008	Order granting motion to file amicus curiae brief.	The applications of Product Liability Advisory Council, Inc., and The Alliance of Automobile Manufacturers, Inc., for leave to file amicus curiae briefs in support of respondents are GRANTED. (Cal. Rules of Court, rule 8.200(c)(1).) The clerk of this court is directed to file forthwith the amicus curiae briefs submitted with the applications. Any party may file an answer to the amicus

curiae briefs no later than June 3, 2008. (Cal. Rules of Court, rule 8.200(c)(5).) The applications of Adam C. Sloane and Erika Z. Jones to appear as counsel pro hac vice for amicus curiae The Alliance of Automobile Manufacturers, Inc., are GRANTED. (Cal. Rules of Court, rule 9.40.) Donald M. Falk is the associated attorney of record. (Cal. Rules of Court, rule 9.40(a).) Counsel for amici curiae are reminded that whether amici curiae may participate in oral argument is at the discretion of the panel hearing the matter (Cal. Rules of Court, rule 8.256(c)(2)), and that the number of counsel who may argue for any person is subject to the limitations contained in California Rules of Court, rule 8.256(c)(3).

		Any request by amici curiae to argue must be made by separate written application no later than 20 days before the date set for oral argument. This matter is set for the August 2008 oral argument calendar. Notice of the date and time will be given by the clerk of this court.
05/16/2008	Amicus curiae brief filed by:	Amicus curiae for respondent: Product Liability Advisory Council, Inc. Attorney: Todd Eric Lundell
05/16/2008	Amicus curiae brief filed by:	Amicus curiae for respondent: Alliance of Automobile Manufacturers, Inc. Attorney: Donald M. Falk
05/23/2008	Response to amicus curiae brief filed by:	by aplts.
05/23/2008	To court.	respondent's request for judicial notice w/1 vol exhibits submitted

		separately (exhibits received only)
06/05/2008	Case briefed and on assignment panel.	for August 2008 Calendar
07/09/2008	Order filed.	Respondents' request for judicial notice will be decided in conjunction with the decision on appeal.
07/10/2008	Calendar notice sent. Calendar date:	8/26/08 at 9:00 a.m.
08/18/2008	pro hac vice application	Application of David R. Kelly to appear on behalf of respondents Mazda Motor Corporation and Mazda Motor of America, Inc.
08/19/2008	To court.	Application of David R. Kelly to appear on behalf of respondents Mazda Motor Corporation and Mazda Motor of America, Inc.
08/20/2008	pro hoc vice granted	The application of David R. Kelly to appear as counsel pro hac vice for

		defendants and respondents Mazda Motor of America, Inc. and Mazda Motor Corporation is GRANTED. (Cal. Rules of Court, rule 9.40.) Brian Takahashi and/or Robert S. Robinson are the associated attorneys of record. (Cal. Rules of court, rule 9.40(a).)
08/22/2008	Mail returned and re-sent.	copy of order dated 08/20/08 to atty. David Kelly
08/26/2008	Cause argued and submitted.	Atty Howard B. Miller argued for aplts. Atty David R. Kelly argued for resps. Atty Brian Takahashi was present on behalf of resps.
10/22/2008	Opinion filed.	Judgment affirmed (Signed Published) Request for judicial notice granted. (Rylaarsdam) Sills Ikola
11/03/2008	Rehearing petition filed.	by aplts.

11/12/2008	Answer to rehearing petition filed.	By respondents
11/18/2008	Mod. of opinion filed (no change in judgment).	The petition for rehearing is denied. Rylaarsdam/Sills/Ikola
12/03/2008	Service copy of petition for review received.	by appellant
12/10/2008	Record transmitted to Supreme Court.	1-misc, 1-aob, 1-rb, 1-arb, 1-petition for rehearing, 1-answer for rehearing, 1-petition for Review, 1-answer to amicus curaie, 1- application for product liability.
01/26/2009	Ext. by Supreme Court re: petition for hearing filed:	to 02/27/09
02/18/2009	Petition for review denied in Supreme Court.	Filed 2/11/09 The petition for review is denied.
02/19/2009	Remittitur issued.	
02/19/2009	Case complete.	
02/26/2009	Record returned from Supreme Court.	1 misc. folder, 1 aob, 1rb, 1arb, 1 petition for hearing, 1answer

		to petition for hearing, 1 amicus brief
04/28/2009	Received copy of:	Supreme Court letter dated 04/24/09 re the petition for a writ of certiorari in the above entitled case was filed on 04/22/09 and placed on the docket 04/24/09 as No. 08-1314.
12/01/2009	Record shipped to records center	list # 84 loc# 622212581
06/01/2010	Received copy of:	US Supreme Court notice dated 5/24/10: The Court today entered the following order in the above-entitled case: The petition for a writ of certiorari is granted limited to Question 1 presented by the petition. (No. 08-1314).

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Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF
ORANGE COUNTY

DELBERT WILLIAMSON, ALEXA WILLIAMSON, THROUGH HER GUARDIAN AD LITEM, DELBERT WILLIAMSON AND THE ESTATE OF	No. 04CC06494 **COMPLAINT FOR PERSONAL INJURY AND PRODUCT LIABILITY AND FOR WRONGFUL**

THANH WILLIAMSON, AND DOES 1-10, inclusive,

Plaintiffs,

v.

MAZDA MOTOR OF AMERICA INC., FORD MOTOR COMPANY, AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, AND DOES 1-10, inclusive,

Defendants.

DEATH AND FOR EXEMPLARY DAMAGES

(Filed Jun. 7, 2004)

JUDGE ROBERT H. GALLNAN DEPT. C28

Plaintiffs, and each of them, for their claims against Defendants, Ford Motor Company, Mazda Motor of America Inc., Automatic Equipment Manufacturing Company, and Does 1-10, jointly and separately allege as follows:

GENERAL ALLEGATIONS

1) Delbert Williamson and Alexa Williamson were at all times relevant are and were residents of the State of Utah.

2) Mazda Motor of America Inc., hereinafter referred to as "MAZDA," has its principal place of business in Irvine, California.

3) Ford Motor Company, herein after referred to as "FORD" is a company that was organized and incorporated under the laws of Delaware and

has its principal place of business in Detroit, Michigan.

4) Automatic Equipment Manufacturing Company, herein after referred to as "AUTOMATIC" is a company that was organized under the laws of Nebraska and has its principal place of business in Nebraska. "BLUE OX" is a division of AUTOMATIC.

5) Does 1-10 are business entities and/or individuals who are legally responsible – and whose identities are at present unknown – for the injuries and death described herein.

6) On information and belief, FORD and MAZDA, shared design development certification manufacturing and distribution responsibility for the Mazda vehicle which was being driven by Delbert Williamson at the time of the accident herein.

7) On or about August 14, 2002, in Kane County, Township of Orderville, in the State of Utah, Jack W. Bonzelaar, hereinafter referred to as "BONZELAAR," an employee of Sandcastle Properties, was traveling south on State Route 89, in the vicinity of the intersection of 290 North Center Street. Mr. Bonzelaar was towing a 1998 Jeep Wrangler, which became detached from the motor home being driven by him. The Jeep went across the center line and struck the 1993 Mazda MPV Minivan driven by Delbert Williamson.

8) Inside the 1993 Mazda MPV Minivan being driven by Delbert Williamson, Alexa Williamson

was in the middle row of seats behind the driver. Thanh Williamson was riding in the middle row center seat. Each of the Williamsons was wearing a fastened seat belt that was original equipment. Delbert Williamson and Alexa Williamson were wearing three point seat belts which were furnished with the Mazda vehicle. Thanh Williamson was wearing a lapbelt only, which was also furnished by the manufacturer.

9) The Mazda vehicle described above was defective and not crash worthy, in at least the following respects:

a) The front bumper of the vehicle contained no energy-absorbing foam or similar substance, nor was it an effective bumper in that it failed to absorb reasonable amounts of energy;

b) There was no horizontal bar in the driver's door, which permitted the door to buckle and the door latch to fail;

c) Certain welds in the vehicle were defective;

d) As a result of the aforementioned, and other defects in manufacture and design, and the lack of crush space, the driver's compartment was compromised, causing severe injury to Delbert Williamson;

e) Due to the lack of energy absorption materials in the defectively designed and manufactured vehicle, and due to a defective seat and seat-belt performance, Alexa Williamson sustained more rapid

deceleration and greater force to her body then she would have suffered otherwise, thereby causing severe and permanent injuries; and

f) The design calling for the installation of only a lap belt in the particular unique situation involving:

(1) Defective seat back;

(2) Defective welds;

(3) Lack of energy absorption-crush material in the front end of the vehicle; and

(4) improper anchoring of seat belt with improper angle.

g) The defective performance of the seat and of the lap-belt only restraint system, and including a defective seat back that broke – all these defects and others listed above, constituted a defect in design and manufacture, and together caused Thanh Williamson to go forward into the belt and caused her to suffer crushing to her mid section, severing major arteries which defects in design and manufacture were a substantial cause of her bleeding to death.

10) A Blue Ox tow bar, made by Blue Ox division of AUTOMATIC utilized by Bonzelaar, was defective in manufacture, in design and in lack of warning. Jack-knifing, which occurred previous to the accident, was a common and foreseeable occurrence, which resulted in foreseeable failures of components of the draw bar

assembly. Defects in design, manufacture and assembly of the trailer draw-bar assembly contributed as a substantial cause of the accident in that these defects contributed as a substantial cause of the jeep breaking loose from the trailer hitch.

11) Defendants failed to warn, as follows:

a) MAZDA and FORD failed to warn of the dangers foreseeable to FORD and MAZDA to driver and passengers in the uncrash-worthy Mazda;

b) AUTOMATIC failed to warn of the danger, which was foreseeable to AUTOMATIC, associated with driving this particular trailer bar after it had jack-knifed and failed to enumerate the foreseeable consequences of jack-knifing.

12) If the subject Mazda vehicle had been designed by FORD and MAZDA to be crashworthy and did not have the defects set forth above, the injuries to each of the plaintiffs would have been substantially less and Thanh Williamson would have survived the collision. It was a defect in design for MAZDA and FORD to place only a seatbelt with the performance characteristics it had in the manner in which it was installed at the seat of Thanh Williamson, particularly with a weak seat back and poor support under the seat bottom (an additional defect under the combination of circumstances) and lack of energy-absorbing materials in the vehicle. The angle between the belt anchor and the passenger's lap was also defective in design, in

that the lap belt did not cross the passenger's lap at a proper angle, but was likely in the configuration of the seat to override the pelvis of the passenger with this particular seat and seat back.

13) The Mazda vehicle, as a whole, was defective in its lack of crash worthiness, in that a person in the seating position that Thanh Williamson utilized, would be exposed to unusual forces and more rapid deceleration than is reasonable, exposing her to severe and fatal injury when only a lap belt was provided and improperly installed and in combination with a defective seat and seat back and seat belt geometry and poor performance, and with the other defects enumerated above.

14) MAZDA and FORD knew of these defects and that a substantial number of people would lose their lives or be severely injured because of the aforesaid defects. Nevertheless, and in conscious disregard of the safety of others, these Defendants acted egregiously and with malice, deliberately exposing passengers to severe injury or death in order to maximize profits at the expense of safety.

15) As a result of the defects and failures to warn alleged above, Delbert Williamson, Alexa Williamson, and the Estate of Thanh Williamson have incurred medical expenses in an amount within the jurisdiction of the Court, which will be supplied according to proof.

16) As a result of the defects and failure to warn alleged above, Delbert Williamson has suffered

loss of wages, which will be supplied according to proof.

17) As a result of the defects and failures to warn alleged above, Delbert Williamson incurred funeral and burial expenses for Thanh Williamson's Estate in an amount within the jurisdiction of the Court, which will be supplied according to proof.

18) As a result of the death of Thanh Williamson, which followed several hours of pain and suffering, Delbert Williamson, her husband, and Alexa Williamson, her daughter, have suffered a loss of love, affection, support, counsel, comfort, and society, to their general damages in an amount within the jurisdiction of this Court.

19) The aforementioned defects in design and manufacture and failures to warn were a substantial contributory cause of severe injury to Delbert Williamson and, Alexa Williamson, and to Thanh Williamson, which resulted in pain, impairment of normal bodily functions, and in the case of Thanh Williamson, her eventual death, to the general damage of Delbert and Alexa Williamson and in general and special damages to the estate of Thanh Williamson.

WHEREFORE, Plaintiffs individually pray as follows:

(1) For compensatory damages to each according to proof,

(2) For special damages to each according to proof,

(3) For exemplary damages to deter such conduct and make an example of Defendants;

(4) For cost of suit; and

(5) For such other relief as the Court determines to be just in the circumstances.

Dated: June 1, 2004

LAW OFFICES OF
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**SUPERIOR COURT OF
THE STATE OF CALIFORNIA
COUNTY OF ORANGE**

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, INC., FORD	**CASE NO. 04CC06494** Hon. Robert H. Gallivan (Dept. C28) **FIRST AMENDED COMPLAINT** 1. Strict Liability 2. Negligence 3. Intentional Misrepresentation and Concealment 4. Wrongful Death

MOTOR COMPANY, AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, and DOES 1-100, inclusive, Defendants.	**DEMAND FOR JURY** (Filed Sep. 30, 2004)

Plaintiffs DELBERT WILLIAMSON, ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson, and ESTATE OF THANH WILLIAMSON hereby allege as follows:

SUMMARY

1. On or about August 14, 2002, Plaintiffs Delbert Williamson, Alexa Williamson, and the decedent Thanh Williamson, represented through her Estate ("PLAINTIFFS"), were injured while they were traveling in their 1993 Mazda MPV Minivan when it was struck head-on by a 1998 Jeep Wrangler that had crossed the center divider line of a highway, after having become detached from a motor home being driven by Jack W. Bonzelaar.

2. All passengers in the Williamsons' 1993 Mazda MPV Minivan wore seat belts. Thanh Williamson, however, was killed when the forces generated by this collision caused her body to "jackknife" around her defective lap belt, causing severe abdominal injuries and internal bleeding. Her husband and daughter, Delbert and Alexa Williamson, were also severely injured in the accident due to the defective

and uncrashworthy design of the 1993 Mazda MPV Minivan.

PARTIES

3. Plaintiff Delbert Williamson is an individual who resides in the State of Utah and is the deceased Thanh Williamson's husband.

4. Plaintiff Alexa Williamson is who resides in the State of Utah and is Delbert Williamson and the deceased Thanh Williamson's daughter.

5. Plaintiff Estate of Thanh Williamson is the probate estate of the deceased Thanh Williamson and is represented by her Survivors, Delbert Williamson and Alexa Williamson.

6. Defendant MAZDA MOTOR OF AMERICA, INC. ("MAZDA") is a California corporation, with its principal place of business in Irvine, California.

7. Defendant FORD MOTOR COMPANY ("FORD") is a Delaware corporation, with its principal place of business in Dearborn, Michigan. Based on information and belief, from January 1, 1979, to the present, FORD has a substantial and/or controlling ownership interest in MAZDA and many of MAZDA's automobiles are based in whole or in part on FORD's designs and technology.

8. Defendant AUTOMATIC EQUIPMENT MANUFACTURING COMPANY ("AEM") is a Nebraska

corporation, with its principle place of business in Pender, Nebraska.

9. The true names and/or capacities, whether individual, corporate, associate or otherwise, of Defendants DOES 1 through 100, inclusive, are unknown to PLAINTIFFS, who therefore sue said DEFENDANTS by such fictitious names. PLAINTIFFS are informed and believe, and upon such information and belief allege, that each of the DEFENDANTS fictitiously named herein as a DOE is legally responsible, negligently or in some other actionable manner, for the events and happenings hereinafter referred to, and proximately caused the injuries and damage to PLAINTIFFS hereinafter alleged. PLAINTIFFS will seek leave of Court to Amend this Complaint to assert the true names and/or capacities of such fictitiously named DEFENDANTS when the same have been ascertained.

10. PLAINTIFFS are informed and believe, and thereupon allege, that at all times mentioned herein, DEFENDANTS, including DOES 1 through 100, were the agents, servants, employees and/or joint venturers of their co-DEFENDANTS, and were, as such, acting within the course, scope and authority of said agency, employment and/or joint venture, and that each and every DEFENDANT, as aforesaid, when acting as a principal, was negligent in the selection and hiring of each and every DEFENDANT as an agent, employee and/or joint venturer.

11. MAZDA, FORD, and DOES 1 through 100, are at all time herein mentioned were engaged in the business of selling, manufacturing, designing, testing, engineering, marketing, modifying, assembling, inspecting, distributing, and controlling Mazda MPV Minivans and other similar automobiles. MAZDA, FORD, and DOES 1 through 100, market, distribute, sell, modify and repair their vehicles, including the 1993 Mazda MPV Minivan, within the County of Orange, State of California.

12. MAZDA, FORD, and DOES 1 through 100, knew, expected and intended the 1993 Mazda MPV Minivans and other similar automobiles and/or substantially similar automobiles to be used for the purposes of transporting persons and property.

13. MAZDA, FORD, and DOES 1 through 100, at all times herein mentioned knew, expected and intended that the 1993 Mazda MPV Minivan and other similar automobiles and/or substantially similar automobiles and their component parts would be purchased and used by the purchaser or user without inspection for defects or dangerous propensities or properties therein or in any of its component parts.

14. MAZDA, FORD, and DOES 1 through 100, knew, expected and intended that the 1993 Mazda MPV Minivan and other similar automobiles, including its component parts, were highly dangerous and equipped with hazardous instrumentalities to persons riding in them and/or close proximity to them should such automobile, particularly its restraint

systems, or any associated parts or components and/or the design, materials, workmanship, configuration, or location thereof be in any manner defective or fail use.

GENERAL ALLEGATIONS

15. On August 14, 2002, Delbert Williamson, Thanh Williamson, and their daughter, Alexa Williamson, were traveling in their 1993 Mazda MPV Minivan, heading north on Route 89 in Kane County, Utah. Delbert was driving the Minivan, Thanh was sitting in the middle seat of the middle row of seats, and Alexa was sitting just behind Delbert in the middle row, next to her mother. Delbert, Thanh, and Alexa were all wearing their seatbelts, but whereas Delbert and Alex were wearing three-point seatbelts, Thanh was wearing a two-point seatbelt or lap belt.

16. Meanwhile, Jack W. Bonzelaar was driving a motor home, heading south on Route 89, towing a 1998 Jeep Wrangler using a "Blue Ox" tow bar. Suddenly, the Jeep Wrangler became detached from Bonzelaar's motor home and crossed the center divider line of Route 89, striking the 1993 Mazda MPV Minivan being driven by Delbert Williamson.

17. As a proximate result of this collision, Thanh Williamson suffered fatal abdominal injuries and internal bleeding, Delbert Williamson suffered fractures to the right wrist, ankle and foot, and Alexa Williamson suffered abdominal contusions and mesenteric hematoma, requiring surgical intervention.

These injuries would not have occurred or they would not have been as severe had FORD, MAZDA, and DOES 1 through 100 designed the subject 1993 Mazda MPV ("SUBJECT VEHICLE") and its components to be safer and more crashworthy.

18. FORD, MAZDA, and DOES 1 through 100, designed tested, engineered, manufactured, assembled, distributed, marketed and sold the SUBJECT VEHICLE.

19. At the time of its manufacture and retail sale by FORD, MAZDA, and DOES 1 through 100, the SUBJECT VEHICLE was defective, uncrashworthy, and unsafe for its intended purposes and uses in that, among other respects:

a. It was equipped with inferior and unsafe two-point lap belts in the middle seating positions, when it should reasonably have been equipped with three point seat belts, as the remaining seats in the SUBJECT VEHICLE;

b. It was not equipped with a front bumper that did not [sic] contain sufficient energy-absorbing foam or similar substance, sufficient to absorb reasonable amounts of force from a collision;

c. It was not equipped with a horizontal bar in the driver's door, to protect against buckling and to permit the door latch to remain operational; and

d. Its front seating area lacked sufficient crush space, such that in a frontal collision, the driver and front passenger's seats are compromised.

20. FORD, MAZDA, and DOES 1 through 100, breached their duty of care to PLAINTIFFS by failing to use reasonable care in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the SUBJECT VEHICLE, as follows:

a. FORD, MAZDA, and DOES 1 through 100 had knowledge, prior to the sale of the SUBJECT VEHICLE to PLAINTIFFS, of the dangers of two-point lap belts and failed to warn PLAINTIFFS and other consumers of such dangers;

b. FORD, MAZDA, and DOES 1 through 100 failed to adequately evaluate the performance and crashworthiness of the SUBJECT VEHICLE;

c. FORD, MAZDA, and DOES 1 through 100 failed to make necessary modifications to the design of the SUBJECT VEHICLE after receiving notice that the design of the SUBJECT VEHICLE was defective and unreasonably dangerous; and

d. FORD, MAZDA, and DOES 1 through 100 failed to adequately warn and instruct PLAINTIFFS and other purchasers and users of the SUBJECT VEHICLE and similar vehicles with respect to the hazards risks, and dangers of the SUBJECT VEHICLE;

e. FORD, MAZDA, and DOES 1 through 100 included false and misleading information in advertising that misrepresented the safety features of the vehicle associated with the restraint system and failed to adequately apprise prospective purchasers of the latent defects associated with the restraint system; and

f. FORD, MAZDA, and DOES 1 through 100 failed to recall and repair with two-point restraint system and other above-described defective components of the SUBJECT VEHICLE.

21. FORD, MAZDA, and DOES 1 through 50, as automobile manufacturers/assemblers, have known for decades about the dangers associated with lap-only seatbelts in frontal collisions. Despite this knowledge and the fact that frontal collisions account for over 60% of all collisions, FORD, MAZDA, and DOES 1 through 50 have engaged in despicable conduct by marketing the SUBJECT VEHICLE as safe, when it was not, and selling this unsafe vehicle to the public at large knowing that it was not safe, in willful and conscious disregard of the public's safety.

22. FORD and MAZDA's despicable conduct in willful and conscious disregard of the safety of their customers is evidenced by internal company documents:

a. In an intra-company communication dated September 19, 1967, almost 40 years ago, FORD concluded that "when properly worn,

a 3-point, diagonal shoulder belt system has been demonstrated to offer much greater protection to the vehicle occupant than does a single lap belt along, since it prevents injuries for jackknifing."

b. In a 1972 SAE paper written by FORD engineers William Shelton and Albert J. Hammond, FORD illustrates the substantial difference in injuries associated with lap belts versus three-point belts.

23. Despite the overwhelming evidence of the risks associated with lap belt only systems from *almost 40 years ago* to the present, FORD and MAZDA have repeatedly lobbied NHTSA to forego its suggested implementation of a new Federal Motor Vehicle Safety Standard which would have required three-point belts at all seating locations in motor vehicles sold to the public.

24. For example, in a letter dated January 30, 1989, from FORD to the National Highway Traffic Safety Administration("NHTSA"), FORD states: "*Ford believes lap/shoulder belts can provide superior protection to lap belts in most accident situations. Indeed, Ford had planned to voluntarily provide rear seat lap/shoulder belts in all of its vehicles as soon as that could safely and effectively be done, and all of Ford's major competitors had announced similar plans. Therefore, adoption of a requirement for rear seat lap/shoulder belts at this time would not improve motor vehicle safety.*" FORD made these false

statements to NHTSA when all of FORD's own testing of two-point lap belts suggested otherwise.

25. Based on information and belief, from January 1, 1979 to the present, FORD has had a substantial and/or controlling ownership interest in MAZDA. Many of MAZDA's automobiles are based in whole or in part on FORD's designs and technology, and vice versa. MAZDA and its employees were privy to the development and testing performed on two-point versus three-point seat belts performed by FORD. Therefore, FORD's knowledge of the dangers of two-point lap belts must be imputed to MAZDA.

26. AEM and DOES 1 through 100, manufactured, designed, tested, marketed, sold, and were responsible for warning of any risks or dangers of the "Blue Ox" tow bar that was equipped on the motor home driven by Jack W. Bonzelaar. AEM and DOES 1 through 100, knew, or should have known, that the "Blue Ox" tow bar and its component parts would be purchased and used by consumers without inspection for defects or hazards.

27. At the time of its manufacture and retail sale by AEM and DOES 1 through 100, the "Blue Ox" tow bar was defective for its intended purposes and in its manufacture, design, and failure to warn of its propensities to allow a vehicle attached thereto to unhitch from the towing vehicle. In particular, jackknifing, which occurred to Bonzelaar's motor home and Jeep Wrangler, is a foreseeable occurrence to vehicles attached by a "Blue Ox" tow bar and it was

foreseeable that jack-knifing would cause failures of its components, including the draw bar assembly. AEM and DOES 1 through 100 breached their duty of care to PLAINTIFFS by failing to use reasonable care in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the "Blue Ox" tow bar.

28. As a proximate result of the hereinabove and hereinafter alleged acts, omissions, and conduct of MAZDA, FORD, AEM, and DOES 1 through 100, PLAINTIFFS have been injured, sustaining temporary and permanent injuries to their body and nervous system, and severe mental and emotional pain and suffering, by virtue of their own injuries and by having witnessed the suffering and death of Thanh Williamson (*Dillon v. Legg* (1968) 68 Cal.2d 728), all to their general damage in an amount in excess of the minimum jurisdictional limits of the above-entitled Court and to be determined at trial.

29. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, FORD, AEM, and DOES 1 through 100, PLAINTIFFS have incurred and will in the future incur medical expenses for, among other things, physicians, surgeons, medical and nursing attendants, hospital bills, x-rays and other medical care, in a sum to be determined at trial.

30. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, FORD, AEM, and DOES 1 through 100,

Plaintiff Delbert Williamson has suffered loss of wages and a loss of earning capacity, in a sum to be determined at trial.

31. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, FORD, AEM, and DOES 1 through 100, Delbert Williamson has incurred funeral and burial expenses for Thanh Williamson, in a sum to be determined at trial.

32. As a proximate result of the death of Thanh Williamson, which occurred only after she suffered several hours of severe pain and suffering, Delbert Williamson, her husband, and Alexa Williamson, her daughter, have suffered and will continue to suffer from the loss of Thanh Williamson's love, affection, support, counsel, comfort, and society, all to their general damage in a sum to be determined at trial.

33. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, FORD, AEM, and DOES 1 through 100, PLAINTIFFS have incurred various and sundry losses and expenses, in a sum to be determined at trial.

FIRST CAUSE OF ACTION FOR STRICT LIABILITY

(BY PLAINTIFFS, ON THEIR OWN BEHALF AND AS SURVIVORS, AGAINST MAZDA, FORD, AEM, AND DOES 1 THROUGH 100)

34. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

35. FORD, MAZDA and DOES 1 through 100 manufactured, designed, tested, marketed, sold, and were responsible for warning of any risks or dangers of the SUBJECT VEHICLE and its component parts. FORD, MAZDA and DOES 1 through 100 knew, or should have known, that the SUBJECT VEHICLE and its component parts would be purchased and used by consumers without inspection for defects or hazards.

36. At the time of its manufacture and retail sale by FORD, MAZDA and DOES 1 through 100 the SUBJECT VEHICLE was defective, uncrashworthy, and unsafe as described in paragraph 19 above, and FORD, MAZDA and DOES 1 through 100 failed to warn PLAINTIFFS and other consumers of the these defects or hazards as described in paragraph 20 above.

37. AEM and DOES 1 through 100 manufactured, designed, tested, marketed, sold, and were responsible for warning of any risks or dangers of the "Blue Ox" tow bar that was equipped on the motor

home driven by Jack W. Bonzelaar. AEM and DOES 1 through 100 knew, or should have known, that the "Blue Ox" tow bar and its component parts would be purchased and used by consumers without inspection for defects or hazards.

38. At the time of its manufacture and retail sale by AEM and DOES 1 through 100, the "Blue Ox" tow bar was defective as described in paragraph 27 above, and AEM and DOES 1 through 100 failed to warn PLAINTIFFS and other consumers of the these defects or hazards.

39. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, FORD, AEM, and DOES 1 through 100, PLAINTIFFS have suffered damages as alleged in paragraphs 28 through 33 above.

40. The above-alleged conduct of MAZDA, FORD, and DOES 1 through 100 was willful, intentional, malicious, fraudulent, oppressive, despicable, and/or reckless under ***Civil Code § 3294*** because they were aware of the probable consequences of the actions they took and deliberately chose to ignore the consequences. DEFENDANTS intended the consequences that were substantially certain to result from their conduct, and they were aware of the probable harmful consequences of their conduct and willfully and deliberately failed to avoid these consequences. Therefore, PLAINTIFFS are entitled to an award of punitive damages, and will seek such an award at trial in an amount to be proven at trial.

SECOND CAUSE OF ACTION FOR NEGLIGENCE

(BY PLAINTIFFS, ON THEIR OWN BEHALF AND AS SURVIVORS OF THANH WILLIAMSON, AGAINST MAZDA, FORD, AEM, AND DOES 1 THROUGH 100)

41. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

42. FORD, MAZDA, and DOES 1 through 100 owed a duty of care to the PLAINTIFFS in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the SUBJECT VEHICLE and all components and sub-assemblies of the SUBJECT VEHICLE, including the restraint system and its components.

43. FORD, MAZDA, and DOES 1 through 100 breached their duty of care to PLAINTIFFS by failing to use reasonable care in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the SUBJECT VEHICLE as described herein.

44. AEM and DOES 1 through 100 owed a duty of care to the PLAINTIFFS in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the "Blue Ox" tow bar and all components and sub-assemblies of the "Blue Ox" tow bar, including the draw bar assembly.

45. AEM and DOES 1 through 100 breached their duty of care to PLAINTIFFS by failing to use reasonable care in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the "Blue Ox" tow bar as described herein.

46. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, FORD, AEM, and DOES 1 through 100, PLAINTIFFS have suffered damages as alleged in paragraphs 25 through 30 above.

THIRD CAUSE OF ACTION

FOR INTENTIONAL MISREPRESENTATION AND CONCEALMENT

(BY PLAINTIFFS, ON THEIR OWN BEHALF AND AS SURVIVORS, AGAINST MAZDA, FORD, AND DOES 1 THROUGH 100)

47. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

48. MAZDA, FORD, and DOES 1 through 100 represented to PLAINTIFFS and other consumers that the SUBJECT VEHICLE, including but not limited to its two-point lap belts, was safe in its operation, design and function.

49. MAZDA, FORD, and DOES 1 through 100 knew that the SUBJECT VEHICLE was at all relevant times defective because their own research

demonstrated that the two-point lap belt is unsafe and does not provide proper protection for passengers, leading to severe injuries and death.

50. Despite these known dangers to PLAINTIFFS and other consumers, FORD, MAZDA and DOES 1 through 100 marketed and advertised that the SUBJECT VEHICLE, including but not limited to its two-point lap belts, is safe and free from defects. These representations were materially false.

51. MAZDA, FORD, and DOES 1 through 100 intentionally suppressed material facts about the known dangerous propensities of the defects of the SUBJECT VEHICLE, including but not limited to its two-point lap belts, and the great likelihood of grave injury or death to passengers in a collision.

52. MAZDA, FORD, and DOES 1 through 100 were under a duty to disclose to PLAINTIFFS and other consumers all known material facts regarding defects in the SUBJECT VEHICLE, including but not limited to its two-point lap belts.

53. MAZDA, FORD, and DOES 1 through 100 intentionally concealed and suppressed the known material facts regarding defects of the SUBJECT VEHICLE, including but not limited to, the restraint system defects, with the intent to defraud and induce PLAINTIFFS and other consumers to purchase and use the SUBJECT VEHICLE.

54. PLAINTIFFS, as purchasers and users of the SUBJECT VEHICLE, reasonably and justifiably

relied on MAZDA, FORD, and DOES 1 through 100 misrepresentations and nondisclosures regarding defects of the SUBJECT VEHICLE, including but not limited to, the restraint system defects. Because of MAZDA, FORD, and DOES 1 through 100's material misrepresentations and nondisclosures, PLAINTIFFS lacked complete information regarding the defects of the SUBJECT VEHICLE, including but not limited to, the restraint system defects, and the likelihood of grave injury and/or death to passengers in the event of a collision.

55. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, FORD, AEM, and DOES 1 through 100, PLAINTIFFS have suffered damages as alleged in paragraphs 28 through 33 above.

56. The above-alleged conduct of MAZDA, FORD, and DOES 1 through 100 was willful, intentional, malicious, fraudulent, oppressive, despicable, and/or reckless under ***Civil Code § 3294*** because they were aware of the probable consequences of the actions they took and deliberately chose to ignore the consequences. DEFENDANTS intended the consequences that were substantially certain to result from their conduct, and they were aware of the probable harmful consequences of their conduct and willfully and deliberately failed to avoid these consequences. Therefore, PLAINTIFFS are entitled to an award of punitive damages, and will seek such an award at trial in an amount to be proven at trial.

FOURTH CAUSE OF ACTION FOR WRONGFUL DEATH

(BY PLAINTIFFS DELBERT WILLIAMSON AND ALEXA WILLIAMSON AGAINST MAZDA, FORD, AEM, AND DOES 1 THROUGH 100)

57. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

58. As a proximate result of the death of Thanh Williamson, Delbert Williamson, her husband, and Alexa Williamson, her daughter, have suffered and will continue to suffer from the loss of Thanh Williamson's love, affection, support, counsel, comfort, and society, all to their general damage in a sum in excess of the minimum jurisdiction of the above-entitled court.

59. As a proximate result of the death of Thanh Williamson, Delbert Williamson has incurred funeral and burial expenses for Thanh Williamson, in a sum to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, PLAINTIFFS pray for judgment against MAZDA, FORD, AEM, and DOES 1 through 100 as follows:

FIRST CAUSE OF ACTION

1. For compensatory and general damages according to proof;
2. For special and incidental damages according to proof;
3. For costs of suits incurred herein;
4. For pre-judgment interest according to law and proof;
5. For punitive damages; and
6. For such other and further relief as the court deems just and proper.

SECOND CAUSE OF ACTION

1. For compensatory and general damages according to proof;
2. For special and incidental damages according to proof;
3. For costs of suits incurred herein;
4. For pre-judgment interest according to law and proof; and
5. For such other and further relief as the court deems just and proper.

THIRD CAUSE OF ACTION

1. For compensatory and general damages according to proof;

2. For special and incidental damages according to proof;

3. For costs of suits incurred herein;

4. For pre-judgment interest according to law and proof;

5. For punitive damages; and

6. For such other and further relief as the court deems just and proper.

FOURTH CAUSE OF ACTION

1. For compensatory and general damages according to proof;

2. For special and incidental damages according to proof;

3. For costs of suits incurred herein;

4. For pre-judgment interest according to law and proof; and

5. For such other and further relief as the court deems just and proper.

JURY DEMAND

PLAINTIFFS hereby demand a trial by jury on all claims so triable.

DATED: September 29, 2004

GIRARDI | KEESE

By: /s/ David Lira
DAVID R. LIRA
Attorneys for
PLAINTIFFS

[Proof Of Service Omitted In Printing]

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Mazda North American Operations and
Ford Motor Company

SUPERIOR COURT OF CALIFORNIA COUNTY OF ORANGE

DELBERT WILLIAMSON, ALEXA WILLIAMSON, THROUGH HER GUARDIAN AD LITEM, DELBERT WILLIAMSON AND THE ESTATE OF THANH WILLIAMSON, AND DOES 1 THROUGH 10, inclusive;

Plaintiffs,

vs.

MAZDA MOTOR OF AMERICA, INC. FORD MOTOR COMPANY, AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, AND DOES 1-10 inclusive

Defendants.

Case No. 04CC06494

MAZDA NORTH AMERICAN OPERATIONS' ANSWER TO FIRST AMENDED COMPLAINT

Date Action Filed: June 7, 2004

Assigned to the Honorable Robert H. Gallivan – Department C 28

(Filed Jan. 5, 2005)

Defendant Mazda Motor of America, Inc. d/b/a Mazda North American Operations hereby answers the unverified complaint of plaintiffs as follows:

General Denial

1. Pursuant to Code of Civil Procedure section 431.30, defendant denies each and every allegation contained in each cause of action relating to this answering defendant. Defendant further denies that plaintiff has suffered any injury or damage of any kind attributable in any way to any act or omission of defendant.

First Affirmative Defense

(Failure to State a Cause of Action)

2. The complaint and each of its purported causes of action fail to state facts sufficient to constitute a claim upon which relief against this answering defendant can be based.

Second Affirmative Defense

(Statute of Limitations)

3. The complaint and each of its purported causes of action are barred by the applicable statute of limitations.

Third Affirmative Defense

(Failure to Mitigate)

4. Any recovery by plaintiffs should be reduced by their reason of failure to mitigate damages.

Fourth Affirmative Defense

(Comparative/Intervening Fault)

5. The acts about which plaintiff complains were the fault of careless, negligent, reckless, and unreasonable actions of plaintiff and/or third parties, whose actions caused, in whole or in part, the injuries or damages, if any, sustained by plaintiff. The comparative fault of plaintiff and/or intervening fault of third parties bars or reduces any liability of this answering defendant.

Fifth Affirmative Defense

(Misuse/Abuse of Product)

6. The Vehicle and Product alleged to be defective was misused and/or abused by the plaintiff or other parties.

Sixth Affirmative Defense

(Alteration of Product)

7. The Vehicle and Product alleged to be defective was altered and/or modified.

Seventh Affirmative Defense

(Joint and Several Liability Unconstitutional)

8. The imposition of joint and several liability is unconstitutional and violates the provisions of the United States Constitution and the California Constitution, including but not limited to, Defendant's rights to due process and equal protection of the law.

Eighth Affirmative Defense

(Punitive Damages Unconstitutional)

9. The imposition of punitive damages is unconstitutional and violates the provisions of the United States Constitution and the California Constitution, including but not limited to, Defendant's rights to due process and equal protection of the law.

Ninth Affirmative Defense

Defendant may have additional affirmative defenses available to it of which it is not now fully aware. Defendant reserves the right to assert affirmative defenses after the same shall have been ascertained.

WHEREFORE, defendant demands:

1. Plaintiffs take nothing from defendant;

2. The Court enter judgment dismissing the First Amended Complaint and each of its purported causes of action with prejudice;

3. Defendant be awarded costs of suit, including but not limited to reasonable attorney fees; and

4. Such further relief as the court deems proper.

Dated: January 4, 2005

THE LAW OFFICES OF
MARK O'CONNOR

By: /s/ Mark O'Connor
Mark O'Connor, Esq.
Attorney for Defendants
Mazda Motor of America,
Inc. d/b/a Mazda North
American Operations and
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[Proof Of Service And
Service List Omitted In Printing]

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SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF ORANGE

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, INC., a California corporation; FORD MOTOR COMPANY, a Delaware corporation; AUTOMATIC EQUIPMENT MANUFACTURING	**CASE NO. 04CC06494** Hon. Robert H. Gallivan (Dept. C31) **SECOND AMENDED COMPLAINT** 1. Strict Liability 2. Negligence 3. Intentional Misrepresentation and Concealment 4. Wrongful Death 5. Loss of Consortium **DEMAND FOR JURY**

COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive,

Defendants.

Plaintiffs DELBERT WILLIAMSON, ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson, and ESTATE OF THANH WILLIAMSON hereby allege as follows:

SUMMARY

1. On or about August 14, 2002, Plaintiffs Delbert Williamson, Alexa Williamson, and the decedent Thanh Williamson, represented through her Estate ("PLAINTIFFS"), were injured while they were traveling in their 1993 Mazda MPV Minivan when it was struck head-on by a 1998 Jeep Wrangler that had crossed the center divider line of a highway, after having become detached from a motor home being driven by Jack W. Bonzelaar.

2. All passengers in the Williamsons' 1993 Mazda MPV Minivan wore seat belts. Thanh Williamson, however, was killed when the forces generated by this collision caused her body to "jackknife" around her defective lap belt, causing severe abdominal injuries and internal bleeding. Her husband and daughter, Delbert and Alexa Williamson, were also injured in the accident due to

the defective and uncrashworthy design of the 1993 Mazda MPV Minivan.

PARTIES

3. Plaintiff Delbert Williamson is an individual who resides in the State of Utah and is the deceased Thanh Williamson's husband.

4. Plaintiff Alexa Williamson is who resides in the State of Utah and is Delbert Williamson and the deceased Thanh Williamson's daughter.

5. Plaintiff Estate of Thanh Williamson is the probate estate of the deceased Thanh Williamson and is represented by her Survivors, Delbert Williamson and Alexa Williamson.

6. Defendant MAZDA MOTOR OF AMERICA, INC. ("MAZDA AMERICA") is a California corporation, with its principle place of business in Irvine, California.

7. Defendant FORD MOTOR COMPANY ("FORD") is a Delaware corporation, with its principle place of business in Dearborn, Michigan.

8. Defendant AUTOMATIC EQUIPMENT MANUFACTURING COMPANY ("AEM") is a Nebraska corporation, with its principle place of business in Pender, Nebraska.

9. Defendant MAZDA MOTOR CORPORATION ("MAZDA") is a Japanese corporation, with its principle place of business in Hiroshima, Japan.

10. The true names and/or capacities, whether individual, corporate, associate or otherwise, of Defendants DOES 1 through 100, inclusive, are unknown to PLAINTIFFS, who therefore sue said DEFENDANTS by such fictitious names. PLAINTIFFS are informed and believe, and upon such information and belief allege, that each of the DEFENDANTS fictitiously named herein as a DOE is legally responsible, negligently or in some other actionable manner, for the events and happenings hereinafter referred to, and proximately caused the injuries and damage to PLAINTIFFS hereinafter alleged. PLAINTIFFS will seek leave of Court to Amend this Complaint to assert the true names and/or capacities of such fictitiously named DEFENDANTS when the same have been ascertained.

11. PLAINTIFFS are informed and believe, and thereupon allege, that at all times mentioned herein, DEFENDANTS, including DOES 1 through 100, were the agents, servants, employees and/or joint venturers of their co-DEFENDANTS, and were, as such, acting within the course, scope and authority of said agency, employment and/or joint venture, and that each and every DEFENDANT, as aforesaid, when acting as a principal, was negligent in the selection and hiring of each and every DEFENDANT. as an agent, employee and/or joint venturer.

12. Defendants MAZDA, FORD, MAZDA AMERICA, and DOES 1 through 50, are at a times herein mentioned were engaged in the business of selling, manufacturing, designing, testing, engineering,

marketing, modifying, assembling, inspecting, distributing, and controlling Mazda MPV Minivans and other similar automobiles. MAZDA, FORD, MAZDA AMERICA, and DOES 1 through 50, market, distribute, sell, modify and repair their vehicles, including the 1993 Mazda MPV Minivan, within the County of Orange, State of California.

13. MAZDA, FORD, MAZDA AMERICA, and DOES 1 through 50, knew, expected and intended the 1993 Mazda MPV and other similar automobiles and/or substantially similar automobiles to be used for the purposes of transporting persons and property.

14. MAZDA, FORD, MAZDA AMERICA, and DOES 1 through 50, at all times herein mentioned knew, expected and intended that the 1993 Mazda MPV Minivan and other similar automobiles and/or substantially similar automobiles and their component parts would be purchased and used by the purchaser or user without inspection for defects or dangerous propensities or properties therein or in any of its component parts.

15. MAZDA, FORD, MAZDA AMERICA, and DOES I through 50, knew, expected and intended that the 1993 Mazda MPV Minivan and other similar automobiles, including its component parts, were highly dangerous and equipped with hazardous instrumentalities to person riding in them and/or in close proximity to them should such automobile, particularly its restraint systems, or any associated parts or components and/or the design, materials,

workmanship, configuration, or location thereof be in any manner defective or fail use.

GENERAL ALLEGATIONS

16. On August 14, 2002, Delbert Williamson, Thanh Williamson, and their daughter, Alexa Williamson, were traveling in their 1993 Mazda MPV Minivan ("SUBJECT VEHICLE"), heading north on Route 89 in Kane County, Utah. Delbert was driving the SUBJECT VEHICLE Thanh was sitting in the middle seat of the middle row of seats, and Alexa was sitting just behind Delbert in the middle row, next to her mother. Plaintiffs were all wearing their seatbelts, but whereas Delbert and Alexa were wearing three-point seatbelts, Thanh was only wearing a two-point seatbelt or lap belt.

17. Meanwhile, Jack W. Bonzelaar was driving a motor home, heading south on Route 89, towing a 1998 Jeep Wrangler using a "Blue Ox" tow bar. Suddenly, the Jeep Wrangler became detached from Bonzelaar's motor home and crossed the center divider line of Route 89, striking the SUBJECT VEHICLE being driven by Delbert Williamson.

18. As a proximate result of this collision, Thanh Williamson suffered fatal abdominal injuries and internal bleeding, Delbert Williamson suffered fractures to the right wrist, ankle and foot, and Alexa Williamson suffered abdominal contusions and mesenteric hematoma, requiring surgical intervention. These injuries would not have occurred or they would

not have been as severe had FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 designed the SUBJECT VEHICLE and its components to be safer and more crashworthy.

19. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50, designed tested, engineered, manufactured, assembled, distributed, marketed and sold the SUBJECT VEHICLE.

20. At the time of its manufacture and retail sale by FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50, the SUBJECT VEHICLE was defective, uncrashworthy, any unsafe for its intended purposes and uses in that, among other respects:

a. It was equipped with inferior and unsafe two-point lap belts in the middle seating positions, when it should reasonably have been equipped with three-point seat belts, as the remaining seats in the SUBJECT VEHICLE;

b. It was not equipped with a front bumper that did not contain sufficient energy-absorbing foam or similar substance, sufficient to absorb reasonable amounts of force from a collision;

c. It was not equipped with a horizontal bar in the driver's door, to protect against buckling and to permit the door latch to remain operational; and

d. Its front seating area lacked sufficient survival space, such that in a frontal

collision, the driver and front passenger's seats are dangerously compromised.

21. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50, breached their duty of care to PLAINTIFFS by failing to use reasonable care in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the SUBJECT VEHICLE, as follows:

a. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 had knowledge, prior to the sale of the SUBJECT VEHICLE to PLAINTIFFS, of the dangers of two-point lap belts and failed to warn PLAINTIFFS and other consumers of such dangers;

b. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 failed to adequately evaluate the performance and crashworthiness of the SUBJECT VEHICLE;

c. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 failed to make necessary modifications to the design of the SUBJECT VEHICLE after receiving notice that the design of the SUBJECT VEHICLE was defective and unreasonably dangerous;

d. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 failed to adequately warn and instruct PLAINTIFFS and other purchasers and users of the

SUBJECT VEHICLE and similar vehicles with respect to the hazards, risks, and dangers of the SUBJECT VEHICLE;

e. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 included false and misleading information in advertising that misrepresented the safety features of the vehicle associated with the restraint system and failed to adequately apprise prospective purchasers of the latent defects associated with the restraint system; and

f. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 failed to recall and repair with two-point restraint system and other above-described defective components of the SUBJECT VEHICLE.

22. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 have known for decades about the dangers associated with lap-only seatbelts in frontal collisions. Despite this knowledge and the fact that frontal collisions account for over 60% of all collisions, FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 have engaged in despicable conduct in willful and conscious disregard of the safety of consumers by marketing and selling the SUBJECT VEHICLE as safe, when it was not, and failing to disclose to consumers the dangers associated with lap-only seatbelts in frontal collisions.

23. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50, have conducted testing of lap-only seatbelts in comparison to three-point seatbelts. Those tests revealed that three-point seatbelts are far more effective in reducing abdominal, spinal, and other severe injuries in front collisions when compared to lap-only seatbelts. Despite this knowledge, FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 engaged in despicable conduct in willful and conscious disregard of the safety of consumers by choosing to utilize a lap-only seatbelt for the middle rear seat in the SUBJECT VEHICLE instead of a three-point seatbelt, even though three-point seatbelts were technically feasible at the time of the design and manufacture of the SUBJECT VEHICLE. Equipping the SUBJECT VEHICLE with a three-point seatbelt in the middle rear seat would have cost FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 a mere $12.00 per vehicle.

24. Various government-sponsored automotive safety institutes have given the 1993 Mazda MPV the lowest possible rating in crash tests, due in large part to its poor crashworthiness and defective lap-only seat belt.

25. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50's despicable conduct in willful and conscious disregard of the safety of consumers is further evidenced by internal company documents:

a. In an intra-company communication dated September 19, 1967, almost 40

years ago, FORD concluded that "when properly worn, a 3-point, diagonal shoulder belt system has been demonstrated to offer much greater protection to the vehicle occupant than does a single lap belt along, since it prevents injuries for jackknifing." MAZDA, MAZDA AMERICA, and DOES 1 through 50 knew about this information at the time of the design and manufacture of the SUBJECT VEHICLE.

b. In a 1972 SAE paper written by FORD engineers William Shelton and Albert J. Hammond, FORD illustrates the substantial difference in injuries associated with lap belts versus three-point belts. MAZDA, MAZDA AMERICA, and DOES 1 through 50 knew about this information at the time of the design and manufacture of the SUBJECT VEHICLE.

26. Despite the overwhelming evidence of the risks associated with lap belt only systems from *almost 40 years ago* to the present, FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 have repeatedly lobbied the National Highway Traffic Safety Administration ("NHTSA") to forego its suggested implementation of a new Federal Motor Vehicle Safety Standard which would have required three-point belts at all seating locations in motor vehicles sold to the public.

27. For example, in a letter dated January 30, 1989, from FORD to NHTSA, FORD states: "*Ford believes lap/shoulder belts can provide superior protection to lap belts in most accident situations. Indeed, Ford had planned to voluntarily provide rear seat lap/shoulder belts in all of its vehicles as soon as that could safely and effectively be done, and all of Ford's major competitors have announced similar plans. Therefore, adoption of a requirement for rear seat lap/shoulder belts at time would not improve motor vehicle safety.*" FORD made these false statements to NHTSA when all of FORD's own testing of two-point lap belts suggested otherwise.

28. Despite empirical medical/scientific evidence and urgings by NHTSA and the National Traffic and Safety Board ("NTSB"), FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 continued to manufacture vehicles equipped with lap-only belts. On August 8, 1986, the NTSB issued a safety recommendation to auto manufacturers. In this safety recommendation, the chairman of the NTSB noted that its own investigation concluded that *the crash performance of lap-only belts was "very poor."*

a. The NTSB went on to state: "Furthermore, *the Safety Board believes that it may be technically feasible to provide 3 - point, lap/shoulder belts at every seating location*; if so, such systems should be required as soon as possible. As long ago as the 1970s, the NHTSA proposed such

a requirement, at least for passenger cars."

b. The NTSB also stated: "It may be argued that the center front and center rear seating locations in passenger cars have the lowest rates of occupancy, and that therefore it is not warranted to provide the superior protection of lap/shoulder belts at these locations. *The Safety Board believes that, to the extent these seating positions are used, their occupants deserve crash protection equal to those provided for other occupants.*"

29. Based on information and belief, from January 1, 1979 to the present, FORD has had a substantial and/or controlling ownership interest in MAZDA. Many of MAZDA's automobiles are based in whole or in part on FORD's designs and technology, and vice versa. MAZDA and its employees were privy to the development and testing performed on two-point versus three-point seat belts performed by FORD. Therefore, FORD's knowledge of the dangers of two-point lap belts must be imputed to MAZDA.

30. AEM and DOES 50 through 100, manufactured, designed, tested, marketed, sold, and were responsible for warning of any risks or dangers of the "Blue Ox" tow bar that was equipped on the motor home driven by Jack W. Bonzelaar. AEM and DOES 50 through 100, knew, or should have known, that the "Blue Ox" tow bar and its component parts would be

purchased and used by consumers without inspection for defects or hazards.

31. At the time of its manufacture and retail sale by AEM and DOES 50 through 100, the "Blue Ox" tow bar was defective for its intended purposes and in its manufacture, design, and failure to warn of its propensities to allow a vehicle attached thereto to unhitch from the towing vehicle. In particular, jack-knifing, which occurred to Bonzelaar's motor home and Jeep Wrangler, is a foreseeable occurrence to vehicles attached by a "Blue Ox" tow bar and it was foreseeable that jack-knifing would cause failures of its components, including the draw bar assembly. AEM and DOES 50 through 100 breached their duty of care to PLAINTIFFS by failing to use reasonable care in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the "Blue Ox" tow bar.

32. As a proximate result of the hereinabove and hereinafter alleged acts, omissions, and conduct of FORD, MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100, PLAINTIFFS have been injured: sustaining temporary and permanent injuries to their body and nervous system, and severe mental and emotional pain and suffering, by virtue of their own injuries and by having witnessed the suffering and death of Thanh Williamson (Dillon v. Legg (1968) 68 Cal.2d 728), all to their general damage in an amount in excess of the minimum jurisdictional limits of the above-entitled Court and to be determined at trial.

33. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of FORD, MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100, PLAINTIFFS have incurred and will in the future incur medical expenses for, among other things, physicians, surgeons, medical and nursing attendants, hospital bills, x-rays and other medical care, in a sum to be determined at trial.

34. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of FORD, MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100, Plaintiff Delbert Williamson has suffered loss of wages and a loss of earning capacity, in a sum to be determined at trial.

35. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of FORD, MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100, Delbert Williamson has incurred funeral and burial expenses for Thanh Williamson, in a sum to be determined at trial.

36. As a proximate result of the death of Thanh Williamson, which occurred only after she suffered several hours of severe pain and suffering, Delbert Williamson, her husband, and Alexa Williamson, her daughter, have suffered and will continue to suffer from the loss of Thanh Williamson's love, affection, support, counsel, comfort, and society, all to their general damage in a sum to be determined at trial.

37. As a proximate result of the hereinabove alleged acts, omissions and conduct of FORD,

MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100, PLAINTIFFS have incurred various and sundry losses and expenses, in a sum to be determined at trial.

FIRST CAUSE OF ACTION FOR STRICT LIABILITY

(BY PLAINTIFFS, ON THEIR OWN BEHALF AND AS SURVIVORS OF THANH WILLIAMSON, AGAINST FORD, MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100)

38. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

39. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 manufactured, designed, tested, marketed, sold, and were responsible for warning of any risks or dangers of the SUBJECT VEHICLE and its component parts. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 knew, or should have known, that the SUBJECT VEHICLE and its component parts would be purchased and used by consumers without inspection for defects or hazards.

40. At the time of its manufacture and retail sale by FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 the SUBJECT VEHICLE was defective, uncrashworthy, and unsafe as described in paragraph 20 above, and FORD, MAZDA, MAZDA

AMERICA, and DOES 1 through 50 failed to warn PLAINTIFFS and other consumers of these defects or hazards as described in paragraph 21 above.

41. AEM and DOES 50 through 100 manufactured, designed, tested, marketed, sold, and were responsible for warning of any risks or dangers of the "Blue Ox" tow bar that was equipped on the motor home driven by Jack W. Bonzelaar. AEM and DOES 50 through 100 knew, or should have known, that the "Blue Ox" tow bar and its component parts would be purchased and used by consumers without inspection for defects or hazards.

42. At the time of its manufacture and retail sale by AEM and DOES 50 through 100, the "Blue Ox" tow bar was defective as described in paragraph 31 above, and AEM and DOES 50 through 100 failed to warn PLAINTIFFS and other consumers of the these defects or hazards.

43. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of FORD, MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100, PLAINTIFFS have suffered damages as alleged in paragraphs 32 through 37 above.

44. As alleged in paragraphs 22 through 29 above, the conduct of FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 constitutes malice, oppression, and fraud under Civil Code § 3294. Therefore, PLAINTIFFS are entitled to an award of punitive damages.

SECOND CAUSE OF ACTION FOR NEGLIGENCE

(BY PLAINTIFFS, ON THEIR OWN BEHALF AND AS SURVIVORS, AGAINST FORD MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100)

45. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

46. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 owed a duty of care to the PLAINTIFFS in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the SUBJECT VEHICLE and all components and sub-assemblies of the SUBJECT VEHICLE, including the restraint system and its components.

47. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 breached their duty of care to PLAINTIFFS by failing to use reasonable care in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the SUBJECT VEHICLE as described herein.

48. AEM and DOES 50 through 100 owed a duty of care to the PLAINTIFFS in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the "Blue Ox" tow bar and all components and sub-assemblies of the "Blue Ox" tow bar, including the draw bar assembly.

49. AEM and DOES 50 through 100 breached their duty of care to PLAINTIFFS by failing to use reasonable care in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the "Blue Ox" tow bar as described herein.

50. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of FORD, MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100, PLAINTIFFS have suffered damages as alleged in paragraphs 32 through 37 above.

THIRD CAUSE OF ACTION

FOR INTENTIONAL MISREPRESENTATION AND CONCEALMENT

(BY PLAINTIFFS, ON THEIR OWN BEHALF AND AS SURVIVORS, AGAINST FORD MAZDA, MAZDA AMERICA, and DOES 1 through 50)

51. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

52. FORD, MAZDA, MAZDA AMERICA, and DOES I through 50 represented to PLAINTIFFS and other consumers that the SUBJECT VEHICLE, including but not limited to its two-point lap belts, was safe in its operation, design and function.

53. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 knew that the SUBJECT VEHICLE was at all relevant times defective because their own research demonstrated that the two-point lap belt is unsafe and does not provide proper protection for passengers, leading to severe injuries and death.

54. Despite these known dangers to PLAINTIFFS and other consumers, FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 marketed and advertised that the SUBJECT VEHICLE, including but not limited to its two-point lap belts, is safe and free from defects. These representations were materially false.

55. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 intentionally suppressed material facts about the known dangerous propensities of the defects of the SUBJECT VEHICLE, including but not limited to its two-point lap belts, and the great likelihood of grave injury or death to passengers in a collision.

56. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 were under a duty to disclose to PLAINTIFFS and other consumers all known material facts regarding defects in the SUBJECT VEHICLE, including but not limited to its two-point lap belts.

57. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 intentionally concealed and suppressed the known material facts regarding

defects of the SUBJECT VEHICLE, including but not limited to, the restraint system defects, with the intent to defraud and induce PLAINTIFFS and other consumers to purchase and use the SUBJECT VEHICLE.

58. PLAINTIFFS, as purchasers and users of the SUBJECT VEHICLE, reasonably and justifiably relied on FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50's misrepresentations and non-disclosures regarding defects of the SUBJECT VEHICLE, including but not limited to, the restraint system defects. Because of FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50's material misrepresentations and nondisclosures, PLAINTIFFS lacked complete information regarding the defects of the SUBJECT VEHICLE, including but not limited to, the restraint system defects, and the likelihood of grave injury and/or death to passengers in the event of a collision.

59. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50, PLAINTIFFS have suffered damages as alleged in paragraphs 32 through 37 above.

60. As alleged in paragraphs 22 through 29 above, the conduct of FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 constitutes malice, oppression, and fraud under Civil Code § 3294. Therefore, PLAINTIFFS are entitled to an award of punitive damages.

FOURTH CAUSE OF ACTION FOR WRONGFUL DEATH

(BY PLAINTIFFS DELBERT WILLIAMSON AND ALEXA WILLIAMSON AGAINST FORD, MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100)

61. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

62. As a proximate result of the death of Thanh Williamson, Delbert Williamson, her husband, and Alexa Williamson, her daughter, have suffered and will continue to suffer from the loss of Thanh Williamson's love, affection, support, counsel, comfort, and society, all to their general damage in a sum in excess of the minimum jurisdiction of the above-entitled court.

63. As a proximate result of the death of Thanh Williamson, Delbert Williamson has incurred funeral and burial expenses for Thanh Williamson, in a sum to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, PLAINTIFFS pray for judgment against FORD, MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100 as follows:

FIRST CAUSE OF ACTION

1. For compensatory and general damages according to proof;
2. For special and incidental damages according to proof;
3. For costs of suits incurred herein;
4. For pre-judgment interest according to law and proof;
5. For punitive damages;
6. For such other and further relief as the court deems just and proper.

SECOND CAUSE OF ACTION

1. For compensatory and general damages according to proof;
2. For special and incidental damages according to proof;
3. For costs of suits incurred herein;
4. For pre-judgment interest according to law and proof;
5. For such other and further relief as the court deems just and proper.

THIRD CAUSE OF ACTION

1. For compensatory and general damages according to proof;
2. For special and incidental damages according to proof;
3. For costs of suits incurred herein;
4. For pre-judgment interest according to law and proof;
5. For punitive damages;
6. For such other and further relief as the court deems just and proper.

FOURTH CAUSE OF ACTION

1. For compensatory and general damages according to proof;
2. For special and incidental damages according to proof;
3. For costs of suits incurred herein;
4. For pre-judgment interest according to law and proof;
5. For such other and further relief as the court deems just and proper.

JURY DEMAND

PLAINTIFFS hereby demand a trial by jury on all claims so triable.

DATED: April 8, 2005 GIRARDI | KEESE

/s/ David R Lira
DAVID R. LIRA
Attorneys for PLAINTIFFS

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MAZDA MOTOR CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williams and Alexa Williamson,

Plaintiff,

vs.

MAZDA MOTOR OF AMERICA, Inc., FORD MOTOR COMPANY, AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, and DOES 1-100, inclusive,

Defendants.

CASE NO. 04CC06494

Assigned: Hon. Robert H. Gallivan
Department: C31

MAZDA MOTOR CORPORATION'S ANSWER TO PLAINTIFFS' SECOND AMENDED COMPLAINT; DEMAND FOR JURY TRIAL

Action Filed: 7/7/04

Trial Date: None
Motion Cutoff: None
Discovery Cutoff: None

Defendant Mazda Motor Corporation, for itself alone, and for no other parties, answers the Second Amended Complaint of plaintiffs as follows:

Pursuant to California Code of Civil Procedure, Section 431.30, Mazda Motor Corporation denies each of the allegations contained in the Second Amended Complaint filed by plaintiffs and every cause of action of it, and further denies that plaintiffs have been damaged in any sum or sums, or at all.

FIRST AFFIRMATIVE DEFENSE

(Failure to State Cause of Action)

1. Neither the Second Amended Complaint nor any of the causes of action stated in it allege facts sufficient to constitute a cause of action against Mazda Motor Corporation.

SECOND AFFIRMATIVE DEFENSE

(Forum Non Conveniens)

2. Mazda Motor Corporation informed and believes, and on that basis alleges that Plaintiffs Complaint is improperly venued in a less convenient forum and the action should have been brought in a different venue or forum for the convenience of witnesses and the ends of justice.

THIRD AFFIRMATIVE DEFENSE

(Comparative Fault)

3. Mazda Motor Corporation is informed and believes, and on that basis alleges that plaintiffs, plaintiffs' decedents, and others whose conduct is imputable to plaintiffs or plaintiffs' decedents, were negligent in and about the matters and things alleged in the Second Amended Complaint and that negligence and fault contributed directly and proximately to the happening of the incident and to plaintiffs' damages, if any, so that plaintiffs' recovery, if any, shall be diminished by the proportion of said negligence and fault.

FOURTH AFFIRMATIVE DEFENSE

(Assumption of Risk)

4. Mazda Motor Corporation is informed and believes, and on that basis alleges that plaintiffs and/or plaintiffs' decedents at the time and place alleged in their Second Amended Complaint knowingly, voluntarily and freely placed themselves and their decedents in an unsafe and dangerous position, and therefore assumed all resulting risks of injuries.

FIFTH AFFIRMATIVE DEFENSE

(Third Party Liability)

5. Mazda Motor Corporation is informed and believes, and on that basis alleges that the damages plaintiffs allege, if any, were either wholly or partially

negligently caused or contributed to by the persons, firms, corporations, or entities other than, Mazda Motor Corporation either named or unnamed, and Mazda Motor Corporation is entitled to an apportionment among all such parties according to their responsibilities for such injuries and damages, if any, sustained by plaintiffs.

SIXTH AFFIRMATIVE DEFENSE

(No Joint or Several Liability)

6. Mazda Motor Corporation is informed and believes, and on that basis alleges that Mazda Motor Corporation's liability, if any, is limited pursuant to Utah Code Ann., Section 77-27-40 and/or California Civil Code, Section 1431 *et seq.* and any damages awarded to plaintiffs against Mazda Motor Corporation should be accordingly reduced.

SEVENTH AFFIRMATIVE DEFENSE

(Intervening/Superseding Actions)

7. Mazda Motor Corporation is informed and believes, and on that basis alleges that the injuries and damages allegedly sustained by plaintiffs or their decedents, if any, were the direct and proximate result of the intervening and superseding actions of third parties, whether named or unnamed, and not Mazda Motor Corporation.

EIGHTH AFFIRMATIVE DEFENSE

(State-of-the-Art)

8. Mazda Motor Corporation is informed and believes, and on that basis alleges that at the time the Mazda vehicle referred to in plaintiffs' Second Amended Complaint was originally sold and delivered, it comported with the state of the art at the time of manufacture.

NINTH AFFIRMATIVE DEFENSE

(Abuse/Alteration)

9. Mazda Motor Corporation is informed and believes, and on that basis alleges that the Mazda vehicle referred to in the Second Amended Complaint was abused and/or altered after being placed into the stream of commerce in a manner which was not reasonably foreseeable to Mazda Motor Corporation. That abuse and/or alteration reasonably caused or contributed to the happening of the alleged incident and to the injuries, loss, and damages, if any.

TENTH AFFIRMATIVE DEFENSE

(Misuse/Improper Maintenance)

10. Mazda Motor Corporation is informed and believes, and on that basis alleges that the Mazda vehicle referred to in the Second Amended Complaint was misused or improperly maintained. That misuse or improper maintenance reasonably caused or

contributed to the happening of the alleged incident and to the injuries, loss, and damages, if any.

ELEVENTH AFFIRMATIVE DEFENSE

(Mitigation of Damages)

11. Mazda Motor Corporation is informed and believes, and on that basis alleges that plaintiffs have failed to mitigate their damages, if any, in the manner and to the extent required by law.

TWELFTH AFFIRMATIVE DEFENSE

(Failure to Preserve Evidence)

12. Mazda Motor Corporation is informed and believes, and on that basis alleges that plaintiffs' claim is barred in whole or in part because plaintiffs, their counsel or their representatives knew of the existence or likelihood of litigation and failed to preserve crucial evidence.

THIRTEENTH AFFIRMATIVE DEFENSE

(Preemption)

13. Mazda Motor Corporation is informed and believes, and on that basis alleges that plaintiffs' defect claims are barred, in whole or in part, by the doctrine of preemption.

FOURTEENTH AFFIRMATIVE DEFENSE

(Additional Warnings)

14. Mazda Motor Corporation is informed and believes, and on that basis alleges that no additional warnings would have, or could have prevented the alleged incident, the injuries, loss and damages alleged by plaintiffs.

FIFTEENTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

15. Mazda Motor Corporation is informed and believes, and on that basis alleges that plaintiffs' claims are barred in whole or in part by the applicable statutes of limitation, included but not limited to Utah Code Ann., Sections 78-12-25(3), 78-12-25(2), and 70A-2-725(1) and/or California Code of Civil Procedure, Section 335.1 and California Commercial Code, Section 2725.

SIXTEENTH AFFIRMATIVE DEFENSE

(Prior Release)

16. Mazda Motor Corporation is informed and believes, and on that basis alleges that plaintiffs are barred from maintaining this action because of a prior release.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Proper Notice)

17. Mazda Motor Corporation is informed and believes, and on that basis alleges that plaintiffs are barred from maintaining an action for breach of warranty because plaintiffs failed to give proper notice within reasonable time after plaintiffs discovered, or should have discovered, such alleged breach of warranty, including, but not limited to the notice required by Utah Code Ann., Section 70A-2-607(3)(a).

EIGHTEENTH AFFIRMATIVE DEFENSE

(Compliance with Warranty)

18. Mazda Motor Corporation is informed and believes, and on that basis alleges that plaintiffs are barred from maintaining an action for breach of warranty because the Mazda vehicle referred to in the Second Amended Complaint met or exceeded any and all applicable warranties.

NINETEENTH AFFIRMATIVE DEFENSE

(Lack of Privity)

19. Mazda Motor Corporation is informed and believes, and on that basis alleges that plaintiffs and plaintiffs' decedents are barred from maintaining an action for breach of warranty because they are not in privity of contract with Mazda Motor Corporation.

TWENTIETH AFFIRMATIVE DEFENSE

(Limited Warranty)

20. Mazda Motor Corporation is informed and believes, and on that basis alleges that by the applicable law and by the terms of the limited warranty for the subject vehicle, Mazda Motor Corporation is not liable for incidental, consequential, personal injury or emotional distress damages.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Failure to Join Indispensable Party)

21. Mazda Motor Corporation is informed and believes, and that basis alleges, that this action should be dismissed by this court based upon the failure of plaintiffs to join an indispensable party, the adverse driver, Jack Bonzelear.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Conformity with Governmental Standards)

22. Mazda Motor Corporation is informed and believes, and on that basis alleges, that to the extent the product in question conformed to applicable governmental standards, plaintiffs' claims are barred pursuant to Utah Code, Ann., Section 78-14-6(3).

TWENTY-THIRD AFFIRMATION DEFENSE

(Constitutionality of Punitive Damages)

23. Mazda Motor Corporation is informed and believes, and on that basis alleges that Plaintiffs' punitive damages claim violates various provisions of the United States Constitution, the Utah Constitution and the California Constitution.

First, actions such as this seeking the imposition of punitive damages under statutory and California judicial doctrines are essentially criminal in nature and entitle this answering defendant to the rights given to defendants in criminal proceedings under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 7, 15, and Article I, Section VII and Article I, Section X of the Utah Constitution and Article IV, Section 6, of the California Constitution.

Second, the procedures of law in this action which deny such rights to this answering defendant, including, among other things, (i) a requirement that the basis for the imposition of punitive damages be proven by plaintiff beyond a reasonable doubt, and (ii) a unanimous jury verdict in jury trials, violate this answering defendant's rights under such constitutional provisions.

Third, the provisions of Utah and California law limiting the amount of punitive damages which may be awarded in specified types of cases while allowing unlimited punitive damages for other tortuous

conduct, such as that alleged in this action, constitutes impermissible discrimination against those subject to unlimited punitive damage awards, such as this answering defendant, and in favor of those defendants not subject to unlimited punitive damage awards, in violation of Article IV, Section 2, of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 7, and Article IV, Section 16, of the California Constitution.

Lastly, unless Madza Motors Corporation's liability, if any, for exemplary or punitive damages and the appropriate amount of exemplary or punitive damages and the appropriate amount of exemplary or punitive damages are established by clear and convincing evidence, any award of exemplary or punitive damages would violate Madza Motors Corporation's due process rights guaranteed by the Fourteenth Amendment to the Constitution of the United States, Utah Constitution Section I, Article VII and Utah Code Ann. §78-18-1 and by Article I, Section VII of the Constitution of the State of California, and would be improper under the common law and public policies of the States of Utah and California.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Constitutionality of Punitive Damages)

24. Under Utah Code Ann., Section 78-18-1, et seq., the State of Utah is entitled to receive a portion of any amount of damages awarded: excess of $20,000. As a result of the state's right to receive a

portion of punitive damages, the punitive damages are subject to the excessive finds or unusual punishment restrictions under the Eighth Amendment to the Constitution of the United States and Article I, Section IX of the Utah Constitution.

WHEREFORE, Defendant Mazda Motor Corporation prays as follows:

(1) Plaintiffs take nothing by their Second Amended Complaint;

(2) For judgment in favor of defendant Mazda Motor Corporation;

(3) For its costs; and,

(4) For such other and further relief as the court deems proper.

DATED: October 5, 2005

BOWMAN AND BROOKE LLP

By: /s/ [Illegible]
Brian Takahashi
Julian G. Senior
Attorneys for Defendant
MAZDA MOTOR
CORPORATION

DEMAND FOR JURY TRIAL

Mazda Motor Corporation demands a jury trial.

DATED: October 5, 2005

BOWMAN AND BROOKE LLP

By: /s/ [Illegible]
Brian Takahashi
Julian G. Senior
Attorneys for Defendant
MAZDA MOTOR
CORPORATION

[Proof Of Service And Service List
Omitted In Printing.]

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE - CENTRAL JUSTICE CENTER

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, Inc., a California corporation; FORD MOTOR COMPANY, a Delaware corporation;	**CASE NO. 04CC06494** **Assigned: Hon. Michael Brenner** **Department: C20** **DEFENDANT MAZDA MOTOR CORPORATION'S NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS** **[CCP 438 and common law]**

AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive, Defendants.	**Date: July 6, 2006** **Time: 1:30 p.m.** **Dept.: C20** Action Filed: 7/07/04 Trial Date: 8/07/06 Motion Cutoff: 7/23/06 Discovery Cutoff: 7/08/06

TO ALL PARTIES AND THEIR COUNSEL OF RECORD HEREIN:

PLEASE TAKE NOTICE that, on July 6, 2006 at 1:30 p.m. or as soon thereafter as the matter may be heard, in Department "C20" of the above-referenced Court, located at 700 Civic Center Drive West, Santa Ana, California, Defendant Mazda Motor Corporation ("MC") will and does hereby move the Court for an Order Granting Judgment on the Pleadings as to each cause of action, and the entirety of the Second Amended Complaint, as brought by the Estate of Thanh Williamson, and by Plaintiffs Delbert Williamson and Alexa Williamson to the extent that their claims arise from the death of Thanh Williamson. Authority for this Motion is found both in California Code of Civil Procedure section 438 and under the common law.

This Motion is based upon the grounds that Plaintiffs assert that the death of Thanh Williamson, seated in the center rear seat of the Mazda MPV, was directly attributable to the center rear seat being equipped with a lap safety belt, and not a lap and

shoulder belt. But Plaintiffs' claim directly conflicts with the choice that federal law gave to manufacturers to choose which type of safety belt they would install in those center seats. Thus, Plaintiffs' claims are an attempt to circumvent the primacy of federal law through state common (tort) law – an effort that is precluded by the doctrine of preemption. As such, Plaintiffs' claims are barred and fail to state facts sufficient to constitute a cause of action.

This Motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, all matters of which the Court may take judicial notice, including Federal Motor Vehicle Safety Standard 208, as set forth in the Federal Register and described in the attached Request for Judicial Notice, all other records and pleadings on file with the Court herein, and upon such further oral and documentary evidence as may be presented at the hearing on this Motion.

DATED: June 13, 2006

BOWMAN AND BROOKE LLP
BY: /s/ [Illegible]
Brian Takahashi
Robert S. Robinson
Julian G. Senior
Attorneys for Defendant
MAZDA MOTOR
CORPORATION

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION: FEDERAL REGULATIONS, WHICH PREEMPT STATE TORT LAW, PERMITTED MANUFACTURERS THE CHOICE TO USE LAP BELTS IN REAR CENTER SEATS, SUCH AS THE ONE OCCUPIED BY THANH WILLIAMSON

To the extent that their claims derive from the death of Thanh Williamson, Plaintiffs claim that the 1993 Mazda MPV mini van in which they were riding was defective because it had one seat belt system authorized by federal law, and not another, in the rear center seat where Thanh Williamson was seated. At the time the MPV was manufactured, and indeed until a rule effective September 1, 2005, the federal motor vehicle occupant-restraint regulation, FMVSS 208 (49 CFR Section 571.208), gave manufacturers the option to use either a lap belt only or a lap/shoulder belt combination in the center rear seat. Although Mazda Motor Corporation ("MC") availed itself of the lap belt option, Plaintiffs allege it should have chosen the lap/shoulder belt combination. But the U.S. Supreme Court held that FMVSS 208 preempts state-law claims based on an exercise of options granted by FMVSS 208. *Geier v. American Honda Motor Co.* (2000) 529 U.S. 861.

Based on *Geier,* it is clear that claims like Plaintiffs make, to the extent based upon the death of Thanh Williamson, are preempted because they would take away the authorized option to use a lap

belt only. As such, each cause of action by Plaintiffs based on the death of Thanh Williamson is barred, and judgment on the pleadings should be granted.

II. FACTS

A. Accident Background and Plaintiffs' Allegations

Plaintiffs Delbert Williamson and Alexa Williamson allege that on August 14, 2002, they and the decedent Thanh Williamson were traveling in their 1993 Mazda MPV Minivan when it was struck head-on by a 1998 Jeep Wrangler that had crossed the center divider line of a Utah highway, after the Jeep detached from a motor home being driven by Jack W. Bonzelaar. Second Amended Complaint ("SAC"), ¶¶ ___.

Plaintiffs alleged that they and Thanh Williamson were all wearing seat belts. Further, they claim that Thanh Williamson "was killed when the forces generated by this collision caused her body to 'jackknife' around her defective lap belt, causing severe abdominal injuries and internal bleeding." SAC, ¶ 2. Plaintiffs initiated this case on June 7, 2004, and filed the operative SAC on or about June 27, 2005. In that SAC, Plaintiffs alleged that the manufacturer of the Mazda MPV was MC. SAC, ¶ 12.

Plaintiffs' claim as to the seat belt is described as follows: "It was equipped with inferior and unsafe two-point lap belts in the middle seating positions,

when it should reasonably have been equipped with three point seat belts. . . ." SAC, ¶20. (See discussion of these types of safety belts below.) Plaintiffs have made it clear that their claim, as it relates to Thanh Williamson derives from the two-point seat belt. (See RJN ¶1.)

B. History of Pertinent Safety Belt Regulations

Federal Motor Vehicle Safety Standard 208 ("FMVSS 208") sets forth requirements for passenger restraints in "trucks and multi-purpose passenger vehicles" (a category that includes passenger vans like the Mazda MPV at issue here). Only recently (December 8, 2004, effective September 1, 2005) has NHTSA promulgated a rule requiring that rear center seats have the "Type 2 integral lap/shoulder safety belts" claimed as mandatory by Plaintiffs instead of a "Type 1 lap belt." See RJN Exh. "A," Final Rule Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 69 Federal Register No. 235, p. 70904.[1]

The Notice of Proposed Rulemaking ("NPRM") which necessarily preceded the rule summarizes the history of rear center seat safety belt requirements,

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[1] A Type 1 belt, a pelvic restraint, reaches from one side of the pelvis to the other, and thus has 2 points; a Type 2 belt adds a third point, the upper torso, and thus is referred to as a 3-point restraint.

showing that there *was no requirement* prior to this rule that a manufacturer equip center seats with the Type 2 belts. NHTSA "first addressed mandatory lap/shoulder belts for rear seats in 1984. . . ." See RJN Exh. "B," Notice of Proposed Rulemaking, Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 68 Federal Register No. 151, pp. 46546-46547. "While NHTSA acknowledged that a lap/shoulder belt would offer additional protection, it concluded that rear lap belts already provided effective protection to occupants in the rear seat. It also concluded that the cost associated with a rear lap/shoulder belt would be too great, given the low rate of belt use in the rear seat." *Id.* at p. 46547.

In June 1989, NHTSA published a rule "establishing a new requirement mandating lap shoulder belts for forward-facing rear outboard seating positions" for passenger vehicles. In November, that requirement was extended to other vehicles, including "multi-purpose vehicles like passenger vans." *Id.* But in both these rules, "center seating positions and non-forward-facing seating positions were excluded from the requirements." *Id.*

It was not until the current rule, effective September 1, 2005, that NHTSA required multi-purpose vehicles, such as the Plaintiffs' passenger van, to have rear center seats with Type 2 safety belts. Thus, the 1993 Mazda MPV's rear center seat restraint system – a Type 1 lap belt – was fully compliant not only with the standards set then, but with the standards that existed until September 1,

2005 and to be fully implemented by September 1, 2007. See RJN Exh. "A," *supra,* 69 Federal Register No. 235 at p. 70910.

III. PLAINTIFFS' CLAIMS CONFLICT WITH FEDERAL LAW

Under the United States Constitution, federal law is "the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary Notwithstanding." U.S. Const. art. VI, cl. 2. Federal law preempts state law where (1) the state law conflicts with federal law; (2) the federal law occupies a field, and the state law falls within that field; or (3) federal law expressly preempts the state law. *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516; *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923. "Federal regulations have no less pre-emptive effect than federal statutes." *Fidelity Federal Sav. & Loan Assn. v. de la Cuesta* (1982) 458 U.S. 141, 153.

Here, Plaintiff's state-law claims conflict with FMVSS 208, a federal regulation. State law conflicts with federal law, and is preempted, where, *inter alia,* "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Dowhal, supra,* 32 Cal.4th at 923; *Geier v. American Honda Motor Co., supra,* 529 U.S. at 873. Where state law conflicts with federal law, state law "is pre-empted by direct operation of the Supremacy Clause." *Brown v. Hotel & Restaurant*

Employees and Bartenders Int'l. Union (1984) 468 U.S. 491, 501. State law that conflicts with federal law is "without effect." *Cipollone v Liggett Group, Inc.*, supra, 505 U.S. at 516.

Here, Plaintiffs' claims, and the theory of tort law upon which they are founded, "stand as an obstacle" to implementation of FMVSS 208. As such, FMVSS 208 preempts a claim, like plaintiffs', that would impose a duty to use a lap/shoulder belt where FMVSS 208 granted the option to provide *either* a lap only belt or a lap/shoulder belt. See, e.g., *Hurley v. Motor Coach Indus., Inc.* (7th Cir. 2000) 222 F.3d 377, *cert. den.* (2001) 531 U.S. 1148; *Griffith v. General Motors Corp.* (11th Cir. 2002) 303 F.3d 1276, *cert. den.* (2003) 538 U.S. 1023.

A. FMVSS 208 Provides Options to Promote Safety

"Standard 208 was specifically designed to give automobile manufacturers a choice among several options when providing restraint systems for passengers." *Pokorny v. Ford Motor Co.* (3d Cir. 1990) 902 F.2d 1116, 1123. Accordingly, it is well settled that when FMVSS 208 grants a compliance option to advance federal goals, it preempts claims that would take those options away. The Supreme Court addressed the issue in *Geier v. American Honda Motor Co., supra*, 529 U.S. 861. The version of FMVSS 208 in that case gave manufacturers options among passive restraints (including the choice to

install either automatic seat belts or airbags), and also mandated a "gradual passive restraint phase-in" of passive restraints (allowing manufacturers to choose between manual belts and passive restraints on many cars). *Geier*, 529 U.S. at 881. The plaintiff in *Geier* sued the vehicle manufacturer for exercising its option to use manual seat belts rather than airbags.

The Supreme Court held this claim preempted because the claim would interfere with the choices deliberately granted by FMVSS 208 to serve safety. The Court explained that in adopting the version of FMVSS 208 applicable there, the Department of Transportation and its highway-safety agency, the National Highway Traffic Safety Administration ("NHTSA") "deliberately sought variety – a mix of several different passive restraint systems. It did so by setting a performance requirement for passive restraint devices and *allowing manufacturers to choose among different passive restraint mechanisms*, such as air bags, automatic belts, or other passive restraint technologies to satisfy that requirement." *Id.* at 878-79 (emphasis added). Those options, federal regulators determined, were necessary to serve safety; the "*range of choices among different passive restraint devices* . . . would bring about a mix of different devices introduced gradually over time; and FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance – all of which would promote FMVSS 208's safety objectives." *Id.* at 875 (emphasis added). Moreover,

the Secretary of Transportation "had *rejected* a proposed FMVSS 208 'all airbag' standard because of safety concerns (perceived or real) associated with airbags. . . ." *Id.* at 879 (emphasis in original).

Similarly, the Court held, NHTSA intended to phase passive restraints in gradually, and to preserve the option to install manual seat belts for cars not yet required to have passive restraints, for safety reasons: among other things "the phased-in requirement would allow more time for manufacturers to develop air bags or other, better, safer passive restraint systems," would "help develop information about the comparative effectiveness of different systems," and "would promote public acceptance" of new restraint technologies. *Id.* at 879, 881. The Court (quoting NHTSA) summed up that FMVSS 208 "*embodies the Secretary's policy judgment that safety would best be promoted if manufacturers installed alternative protection systems* in their fleets *rather than one particular system* in every car." *Id.* at 881 (emphasis added).

Geier recognized that this method of promoting safety would be undermined if state common-law rules could impose a duty on manufacturers to choose one option over another. Such rules would undercut "the variety and mix of devices" federal regulators sought as a means of promoting safety and "would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed." *Id.* Such claims conflict with federal regulations, and so are not allowed: "Because

the rule of law for which petitioners contend would have stood 'as an obstacle to the accomplishment and execution of' the important means-related federal objectives that we have just discussed, it is pre-empted." *Id.* at 881-82 (citing *Hines v. Davidowitz* (1945) 312 U.S. 52). The Court thus held that plaintiff could not pursue a claim that her car was defective because the manufacturer had chosen to install manual seat belts rather than air bags.

In so holding, *Geier* thus affirmed that FMVSS 208 – both the version that granted options among passive restraints and the earlier versions that granted the option to choose between belt systems – preempts claims that punish the exercise of an option specifically granted by FMVSS 208 to serve safety. *See Hurley, supra* (*Geier* preempts claim based on exercise of one FMVSS 208 option rather than another); *Griffith, supra* (same); *James v. Mazda Motor Corp.* (11th Cir. 2000) 222 F.3d 1323, 1325-27 (same), *cert. den.* (2001) 531 U.S. 921; *Hernandez-Gomez v. Volkswagen of America, Inc.* (Ariz. Ct. App. 2001) 32 P.3d 424, 427-428, *cert. den.* (2002) 537 U.S. 1046 ("we read *Geier* as holding that FMVSS 208 gave manufacturers an unfettered choice among [the listed] options and precluded a common-law action requiring additional safety equipment not otherwise called for by the chosen option."); *Anthony v. Abbott* (D. V.I. 2003) 289 F.Supp.2d 667, 669 (no-side-airbag claim preempted by FMVSS 208 and *Geier* based on conflict with "option of choosing among several different passive restraint mechanisms"); *Carrasquilla*

v. Mazda Motor Corp. (M.D. Pa. 2001) 166 F.Supp.2d 169, 177 (plaintiffs' claim, a "direct attack against defendants for [their] exercise of an option under FMVSS 208," was preempted under *Geier* as "'an obstacle' to the accomplishment and execution of the purposes and objectives of the Safety Act and FMVSS 208, namely the objective of providing manufacturers with flexibility in choosing a restraint system"). *See also Irving v. Mazda Motor Corp.* (11th Cir. 1998) 136 F.3d 764, 769 (federal law preempts claim that car was defective because manufacturer used one FMVSS 208-authorized belt system instead of another; "Plaintiffs' suit against Defendants for their exercise of an option provided to Defendants by FMVSS 208 conflicts with federal law and, thus, is preempted."); *Pokorny*, 902 F.2d at 1116 (same).

Geier also confirmed the propriety of the holding 11 years earlier in *Nissan Motor Corp. v. Superior Court (Meier)* (1989) 212 Cal.App.3d 980, 982. There, the Court of Appeal held that FMVSS 208 preempts a "no airbag" claim which sought liability for the manufacturer's exercise of its option to use a safety belt only.

B. FMVSS 208 Preempts Claims, Like Plaintiffs', That Would Impose a Duty to Use Lap/Shoulder Belts Instead of Lap Belts

Following *Geier,* case law holds that FMVSS 208 preempts claims, like plaintiffs' here, that would take

away FMVSS 208's choice between a lap belt or a lap/shoulder combination. For example, in *Hurley, supra,* 222 F.3d 377, a bus driver argued that his bus was defectively designed because it provided only a two-point lap belt. 222 F.3d at 378, 381. Plaintiff claimed, *inter alia,* that defendant should have installed a three-point belt. 222 F.3d at 380-81. The Seventh Circuit held that FMVSS 208 and *Geier* preempted the suit:

> NHTSA's decision to leave the manufacturers . . . with the option of using a two point seat belt that met regulatory standards is quite understandable as a way of promoting safety by encouraging drivers to use the safety equipment that manufacturers install. But [plaintiff's] proposal unequivocally requires a three point seat belt, a requirement that could reduce utilization and thereby undermine FMVSS 208's safety objectives. . . . The point is that, as in *Geier,* the decision to leave options open to bus manufacturers was made with specific policy objectives in mind. Hurley's suit, if successful, would undermine that policy objective and is therefore preempted.

222 F.3d at 382. Thus, the court continued, "*Geier* confirms . . . that a state lawsuit that forecloses an option left open by FMVSS 208 is in fact preempted." *Id.* at 382. "We conclude that the Supreme Court's opinion in *Geier* governs Hurley's case and compels the conclusion that when a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice

of safety device options, a state suits [sic] that depends on foreclosing one or more those [sic] options is preempted." *Id.* at 383.

Similarly, *Griffith v. General Motors Corp.* (11th Cir. 2002) 303 F.3d 1276, *cert. den.* (2003) 538 U.S. 1023, held that *Geier* and FMVSS 208 preempted a claim that would impose liability for using a two-point belt rather than a three-point belt. FMVSS 208 allowed GM the option to install either a two-point lap belt or a three-point lap/shoulder belt for plaintiff's seating position. 303 F.3d at 1278. GM had chosen the lap belt. 303 F.3d at 1278. Plaintiffs claimed that the vehicle was "defective because of the lap belt only design" for plaintiff's position. 303 F.3d at 1278, 1279. The Eleventh Circuit held that the claim was preempted because it would take away the FMVSS 208 option to use a lap-only belt, and require the manufacturer to use the lap/shoulder combination belt instead. FMVSS 208 "does not mandate any particular type of restraint, but rather requires manufacturers to choose from several specific options in installing a restraint system in their passenger cars and trucks." *Id.* at 1279. Under FMVSS 208, General Motors was "free to install . . . either a lap belt for pelvic restraint or a shoulder/lap belt combination system." *Id.* "If successful, [plaintiff's] suit would foreclose an option specifically permitted by FMVSS 208. Therefore, it conflicts with that federal law and is impliedly preempted." 303 F.3d at 1282.

Still again, the Massachusetts Court of Appeals held that FMVSS 208 preempted based on failure to use a lap/shoulder belt combination in *Heinricher v. Volvo Car Corp.* (Mass. App. 2004) 809 N.E.2d 1094. Plaintiff there was "wearing a two-point lap belt" and riding in the rear seat of a Volvo sedan. 809 N.E.2d at 1095. The plaintiff sued in negligence and breach of warranty, asserting that the vehicle "was defective because it lacked a three-point lap-shoulder harness in the rear center seat" that he occupied. 809 N.E.2d at 1095. Following *Geier*, *Griffith*, and *Hurley*, the court held that FMVSS 208 "plainly provided Volvo . . . with the option of installing *either* a two-point lap belt *or* a three-point lap-shoulder harness in the rear center seat of its vehicles." 809 N.E.2d at 1098. Plaintiffs' action "would hold the defendants liable for choosing one Federally-approved passenger restraint system over another." 809 N.E.2d at 1098. That "would conflict with and stand as an obstacle to the implementation of the comprehensive safety scheme promulgated in Standard 208," so plaintiffs' claims "are preempted as a matter of law." 809 N.E.2d at 1098.

This case is the same. FMVSS 208 granted MC the option to use a lap-only belt or a lap/shoulder belt combination. Mazda chose to use the lap-only belt. Plaintiff seeks to impose a duty to use the lap/shoulder belt. That is the exact claim held preempted by *Hurley, Griffith* and *Heinricher,* and takes away the federally-granted option just as in *Geier*. It accordingly remains preempted here.

C. A Duty to Use Three-Point Belts Would Have Interfered With FMVSS 208's Objectives

Even aside from the case law holding that a no-three-point-belt claim is preempted, such a claim is necessarily preempted because it would interfere with FMVSS 208's method of achieving federal goals. "A state law is also preempted if it interferes with the methods by which the federal statute was designed to reach [its] goal." *Int'l Paper Co. v. Ouellette* (1987) 479 U.S. 481, 494. Here, the Secretary of Transportation deliberately gave manufacturers the choice to use two-point belts in the rear seat as a method of promoting safety. The claimed state-law duty not to use two-point belts would interfere with the Secretary's method, and so is preempted.

Specifically, as noted in the historical portion of the current rule quoted above, in 1984, the Secretary of Transportation, through NHTSA, rejected a petition to require three-point belts in the rear seat. "While NHTSA acknowledged that a lap/shoulder belt would offer additional protection, it concluded that rear lap belts already provided effective protection to occupants in the rear seat. It also concluded that the cost associated with a rear lap/shoulder belt would be too great, given the low rate of belt use in the rear seat." See RJN Exh. "B," Notice of Proposed Rulemaking, Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 68 Federal Register No. 151, p. 46547 (citing 49 Fed. Reg. 15241 (April 18, 1984), attached as Exh. "C" to the RJN.) NHTSA recounted that

FMVSS 208 "currently permits manufacturers to install either Type 1 seat belts (lap belts) or Type 2 seat belts (lap and shoulder combination belts) in the rear seating positions of passenger cars." 49 Fed. Reg. 15241.

In 1989, as the history further relates, NHTSA mandated the Type 2 belts for certain rear seats, but in the two rules promulgated that year, rejected a requirement that "center seating positions and non-forward-facing seating positions" have Type 2 belts, leaving manufacturers the option of using Type 1 or Type 2 belts. As to center seating positions, this decision was made in part, NHTSA writes, because of "the relatively small projected benefits . . . and the potential costs and technical difficulties associated with anchoring the shoulder portion of the belt at the center seating position." RJN Exh. "B," Notice of Proposed Rulemaking, Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 68 Federal Register No. 151, p. 46547.

Thus, as in *Geier,* the Secretary through NHTSA had evaluated safety concerns and rejected mandatory Type 2 (3-point) belts at rear center seating positions. See *Geier*, *supra*, 529 U.S. at 879, 881. Plaintiffs' assertion of MC's alleged duty to use three-point belts would have removed from the marketplace the two-point belts on which the Secretary's policy depended. *See Int'l Paper Co., supra,* 479 U.S. at 484 (state law preempted if it interferes with federal method of achieving goal). Put differently, NHTSA's decision to let manufacturers use a lap-belt-only

system "was made with specific policy objectives. [Plaintiff's] suit, if successful, would undermine that policy objective and is therefore preempted." *Hurley*, 222 F.3d at 382; *Griffith*, 303 F.2d at 1282; *Heinricher*, 809 N.E.2d at 1098. *See also Geier*, 529 U.S. at 881 (claim preempted where it "would have stood 'as an obstacle to the accomplishment and execution of' the important means-related federal objectives that we have just discussed").

IV. CONCLUSION

Under the doctrine of preemption, this Court should grant MC's motion.

Dated: June 13, 2006

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, INC., FORD	**CASE NO. 04CC06494** Hon. Michael Brenner (Dept. C-20) **PLAINTIFFS' OPPOSITION TO MAZDA MOTOR CORPORATION'S MOTION FOR JUDGMENT ON THE PLEADINGS** (Filed Jun 22, 2006) [Filed concurrently with Plaintiffs' Request for Judicial Notice]

MOTOR COMPANY, AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, and DOES 1-100, inclusive, Defendants.	DATE: July 6, 2006 TIME: 1:30 P.M. DEPT.: C-20 Complaint filed: July 7, 2004 Trial date: August 7, 2006

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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

Mazda Motor Corporation's ("MAZDA") motion seeks an Order granting Judgment on the Pleadings as to: (1) every claim brought by the Estate of Thanh Williamson and (2) every claim arising out of the death of Thanh Williamson. (Notice of Motion at 1-2.)

At the outset, MAZDA's motion fails for the simple reason that those claims do not rest entirely on the allegation that MAZDA should have employed lap/shoulder belts at the rear center seating position – those claims also arise out of the allegation that the MPV was not sufficiently crashworthy, i.e. was not designed to absorb reasonable amounts of force from a collision. (Request for Judicial Notice ["RFJN"], Ex. 1, Second Amended Complaint ["SAC"], ¶¶ 2, 18, 20(b).) For this reason alone, MAZDA's motion cannot possibly be granted because it fails to address the allegations concerning crashworthiness.

With this motion, MAZDA is attempting to avoid liability for its failure to install three point lap/shoulder belts in the rear center seat of its MPV minivan, *even though it knew three point belts were the safest form of seat belt technology,* simply because it complied with *a minimum* federal standard that gave car makers the *option* of installing either lap/shoulder belts or lap-only belts in that seating position. There is no support for this proposition in either California law or the United States Supreme Court's decision in *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861.

To the contrary, the *Geier* decision held that Plaintiffs' claims arising out of the lack of a lap/shoulder belt in the rear center seat are expressly and unequivocally exempted from federal preemption by the "savings" clause of the Federal Motor Vehicle Safety Act. This holding has been affirmed by subsequent Supreme Court decisions. See *Bates v. Dow Agrosciences LLC,* (2005) 544 U.S. 431 (plaintiffs claims against manufacturer of pesticide are not preempted by the labeling provision of Federal Insecticide, Fungicide, and Rodenticide Act because of its savings clause); *Sprietsma v. Mercury Marine* (2002) 537 U.S. 51 (federal agency's decision to not require a particular safety feature based on economic considerations and the lack of a "universal" technical solution suitable for use on all vehicles does not have any preemptive effect.)

Accordingly, MAZDA's motion for judgment on the pleadings must be denied.

II. SUMMARY OF FACTS

On or about August 14, 2002, Plaintiffs Delbert Williamson, Alexa Williamson, and the decedent Thanh Williamson, represented through her Estate ("PLAINTIFFS"), were injured while they were traveling in their 1993 Mazda MPV Minivan when it was struck head-on by a 1998 Jeep Wrangler that had crossed the center divider line of a highway, after having become detached from a motor home being driver by Jack W. Bonzelaar. (SAC ¶ 1.)

All passengers in the Williamsons' 1993 Mazda MPV Minivan wore seat belts, but Thanh Williamson was killed when the forces generated by this collision caused her body to "jackknife" around her defective lap belt, causing severe abdominal injuries and internal bleeding and Delbert and Alexa Williamson were also injured due to the vehicle's defective and uncrashworthy design. (SAC ¶ 2.)

The Second Amended Complaint alleges the following defects in the vehicle:

a. It was equipped with inferior and unsafe two-point lap belts in the middle seating positions, when it should reasonably have been equipped with three-point seat belts, as the remaining seats in the SUBJECT VEHICLE;

b. It was not equipped with a front bumper that did not contain sufficient energy-absorbing foam or similar substance,

sufficient to absorb reasonable amounts of force from a collision;

c. It was not equipped with a horizontal bar in the driver's door, to protect against buckling and to permit the door latch to remain operational; and

d. Its front seating area lacked sufficient survival space, such that in a frontal collision, the driver and front passenger's seats are dangerously compromised.

(SAC ¶ 20(a)-(d).)

In addition, PLAINTIFFS' subsequently discovered that the angle and geometry of the seat bottom and integrity of the seat back of the rear seat in which Thanh and Alexa Williamson were seated during the accident were also defective and contributed to their injuries. PLAINTIFFS identified these defects in discovery responses served on June 17, 2005. (RRFJN, Ex. 2, at 4.)

III. MAZDA'S MOTION MUST BE DENIED AT THE OUTSET BECAUSE IT FAILS TO ADDRESS EVERY BASIS FOR PLAINTIFFS' CLAIMS ARISING OUT OF THE DEATH OF THANH WILLIAMSON.

MAZDA's Notice for this motion states that it is seeking "an Order Granting Judgment on the Pleadings as to each cause of action, and the entirety of the Second Amended Complaint, as brought by the

Estate of Thanh Williamson, and by Plaintiffs Delbert Williamson and Alexa Williamson to the extent that their claims arise from the death of Thanh Williamson." (Notice of Motion at 1:27-28 through 2:1-2.)

A notice of motion must state in the first paragraph exactly what relief is sought and why (the grounds). Code of Civil Procedure § 1010; CRC 311(a); *People v. American Sur. Ins. Co.* (1999) 75 Cal.App.4th 719, 726. The court cannot grant different relief, or relief on different grounds, than those stated in the notice of motion. *American Sur. Ins. Co., supra,* 75 Cal.App.4th at 726; *Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1124.

Here, PLAINTIFFS' claims arising out of the death of Thanh Williamson do not rest exclusively on the allegation that MAZDA should have employed three point belts at the rear center seating position-*those claims also arise out of the allegation that the MPV was not sufficiently crashworthy*, i.e. was not designed to absorb reasonable amounts of force from a collision. (SAC, ¶¶ 2, 18, 20(b).) Since MAZDA's notice of motion and attached memorandum of points and authorities fail to address the issue of crashworthiness, this motion must be denied.

IV. PLAINTIFF'S CLAIMS REGARDING THE LACK OF A THREE-POINT SEAT BELT ARE EXPRESSLY EXEMPTED FROM PREEMPTION BY THE SAVINGS CLAUSE OF THE FEDERAL MOTOR VEHICLE SAFETY ACT.

A. Legal Standard Governing Federal Preemption.

As the U.S. Supreme Court has instructed, a party arguing for preemption of state law bears a heavy burden of overcoming the long-standing "presume[ption] that Congress does not cavalierly preempt state-law causes of action." *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485. This burden is especially heavy where, as here, preemption would displace the historic power of the states to protect the health and safety of their citizens. *Id.* at 485. This presumption applies equally to claims of express or implied preemption. *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 958, fn. 11. Where preemption of common-law claims would leave injured individuals without any state or federal remedy, which is the result sought by MAZDA here, a court may find preemption only in the most compelling circumstances. See *English v. General Electric Corp.*, 496 U.S. 72, 87-90; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)

B. Background of Federal Motor Vehicle Safety Standards

In 1996, Congress passed the National Traffic and Motor Vehicle Safety Act of 1996, 15 U.S.C. §§ 1381-1431 (the "Safety Act"), "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. To achieve that goal, Congress empowered the federal Department of Transportation to issue minimum safety standards for motor vehicle performance. See 15 U.S.C. §§ 1391(2), 1392(a). The Department, in turn, delegated this duty to the National Highway Transportation Safety Administration ("NHTSA"). See 49 C.F.R. § 501.2. NHTSA fulfilled its responsibility by promulgating the Federal Motor Vehicle Safety Standards ("FMVSS") published at 49 C.F.R. §§ 571.1-.302. The FMVSS are *minimum* standards that a vehicle must meet in order to be sold in the United States.

Most of the FMVSS are "performance" standards, which set forth how a vehicle must perform under certain circumstances. The most recognizable example of a performance standard is the crash testing section of FMVSS 208, which specifies the maximum injury criteria levels for crash test dummies in particular types of barrier impacts. The FMVSS also contain "design" standards, which dictate the parameters of how certain components are actually designed or placed in the vehicle. One example of a design standard is FMVSS 210, which

dictates certain zones in which seat belt anchors must be installed.

The Safety Act also includes a "savings" clause that provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). In *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861, the U.S. Supreme Court construed this clause as evidencing Congress' intent to "preserve" common law tort claims "that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." *Id.* at 870.

C. The History of the Rear Center Seat Option of FMVSS 208.

At the time the MAZDA MPV at issue was manufactured, FMVSS permitted auto manufacturers to install either two-point lap belts (a "Type 1" system) or three-point lap/shoulder belts (a "Type 2" system) in the rear-center seats of their cars. See 49 C.F.R. § 571.208 S.4.1.4.2. (1990). Since MAZDA's motion rests on this version of FMVSS 208, it is important to understand its evolution in some detail.

The relevant version of FMVSS 208 first took effect in 1968, when NHTSA passed its initial set of motor vehicle safety standards. See 32 Fed. Reg. 2408 (February 3, 1967). At that time, FMVSS 208 required the installation of lap/shoulder belts at the drivers' and right-front passengers' seating positions,

and either lap belts or lap/shoulder belts at every other designated seating position (i.e. the center front seat and all rear seats). *Id.* at 2415. In the preamble accompanying the final rule, NHTSA characterized this rule as a "minimum safety standard" within the meaning of the Safety Act. 32 Fed. Reg. at 2408. The regulatory preamble contained no further explanation or statement of policy with respect to the agency's decision to give car makers the option of installing either lap belts or lap/shoulder belts in rear seating positions. *See id.*

In 1986, the National Transportation Safety Board ("NTSB") issued a Safety Recommendation with respect to lap/shoulder belts. (RFJN, Ex. 3, NTSB Safety Recommendations to "Foreign Manufacturers.") Among other things, the NTSB concluded that "[l[ap/shoulder belts provide superior crash protection to that of lap belts alone, and present a significantly lesser risk of induced injury. . . ." (See RFJN, Ex. 3, at 4.) The NTSB further observed that "such systems appear to work effectively even for children, and they can be used with child safety seats and booster seats." *Id.* The NTSB ultimately recommended that, "[g]iven the known deficiencies of lap-only belt systems and the superior crash protection offered by belt systems that incorporate an upper torso restraint, the Safety Board believes that government and industry should take a number of steps to reduce reliance on lap belts and increase the availability of lap/shoulder belt systems." (See RFJN, Ex. 3, at 5.) With respect to the industry, the NTSB

recommended that "early action ... be taken to provide aftermarket retrofit assemblies to convert lap/only belts to lap/shoulder belts." *Id.* The NTSB further found that such "retrofit assemblies" may be technically feasible "at very [sic] seating location," including rear-center seats. (See RFJN, Ex. 3, at 6.) With respect to new cars, the NTSB recommended that all rear seats – including rear center seats – be equipped with lap-shoulder belts. *Id.*

In 1988, NHTSA proposed to amend FMVSS 208 to require lap/shoulder belts in all rear outboard seating positions of passenger cars. See 53 Fed. Reg. 47982 (November 29, 1988). In its Notice of Proposed Rulemaking, NHTSA stated that it had decided not to propose a rear-center seat requirement based on manufacturers' complaints that the costs of installing lap/shoulder belts in rear-center seats might exceed the anticipated safety benefits. See *id.* at 47984. At no point did NHTSA state that lap/shoulder belts would be unsafe in rear-center seats, or that it affirmatively sought to give car makers the unfettered choice between installing lap belts or lap/shoulder belts in that seating position. To the contrary, it emphasized that "[r]ear seat lap/shoulder belts are estimated to be more effective than rear seat lap belts in reducing fatalities and moderate-to-severe injuries." *Id.* at 47982.

In 1989, NHTSA published a final rule requiring lap/shoulder belts in all rear-outboard seats, but retaining the regulatory option with respect to rear-center seats. See 54 Fed. Reg. 25275 (June 14, 1989).

The regulatory preamble once again emphasized that "NHTSA believes that lap/shoulder belts would be more effective than lap-only belts in rear seating positions." *Id.*

In June 1999, NHTSA published a study on the relative safety advantages of lap belts and lap/shoulder belts in the rear seats of cars. (RFJN, Ex. 4, Effectiveness of Lap/Shoulder Belts in the Back Outboard Seating Positions.) Among other things, the study compared the fatality risk for lap/shoulder belted occupants to the risk for lap-belted occupants. NHTSA's principal conclusion was that "[t]he change from lap to lap/shoulder belts [in rear outboard seats] *has significantly enhanced occupant protection, especially in frontal crashes.*" (RFJN, Ex. 4, at 1.) NHTSA added that:

> In all crashes, lap/shoulder belts are 15 percent more effective than lap belts alone. In frontal crashes, lap/shoulder belts are 25 percent more effective than lap belts alone . . . . Lap/shoulder belts reduce the risk of both head and abdominal injuries in potentially fatal front crashes relative to lap belts only: head injuries by 47 percent and abdominal injuries by 52 percent.

(RFJN, Ex. 4, at 1.)

In December 2002, President Bush signed into law a bill known as "Anton's Law," which provides for the improvement of child safety devices when installed in motor vehicles. See Pub. Law No. 107-318.

One of the provisions of Anton's Law concerns the installation of lap/shoulder belts in rear-center seating positions. Specifically, Section 5(a) of the law directs NHTSA to amend FMVSS 208 to require lap/shoulder belts in rear-center seats by no later than December 2004.

Compelled by this statutory directive, on August 2003, NHTSA published a proposal to require lap/shoulder belts in all rear-center seats. 68 Fed. Reg. 46546 (August 2, 2003). At the time, NHTSA stated that Anton's Law is "fully consistent with the agency's preexisting plan to initiate rulemaking" to require lap/shoulder belts in rear-center seats. *Id.* at 46547. In its notice of proposed rulemaking, NHTSA once again emphasized the special safety benefits of lap/shoulder belts for children, stating that "one of the primary reasons for today's proposal is the increased protection that children between the ages of four and eight gain by having a lap/shoulder belt made available in rear center seating positions. When these lap/shoulder belts are installed in the rear center seating position, there will be an additional, and potentially safer, seating position available for a child in a belt-positioning booster seats." *Id.* at 46548. NHTSA further emphasized that requiring lap/shoulder belts in rear-center seats would not just benefit children: [i]t would also benefit older occupants." *Id.*

D. Geier v. American Honda

Relying on *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861, MAZDA contends that all of PLAINTIFFS' claims arising out of the death of Thanh Williamson are preempted by federal law. *Geier,* however, is not applicable here.

Geier involved a "no airbag" claim. The plaintiff alleged that her injuries were exacerbated by the fact that her vehicle – a 1987 Honda Accord – lacked a driver's side airbag. *Id.* at 865. Plaintiff asserted that Honda had designed the car negligently and defectively by failing to equip the car with a driver's side airbag. *Id.*

Honda argued that this no airbag claim was preempted by the Safety Act, and in particular, FMVSS 208. Honda cited the portion of FMVSS 208 that required car manufacturers to "phase in" passive restraint requirements beginning in model year 1987. According to the court, there were two important prongs to this phase in requirement. First, the requirements allowed manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic seatbelts, etc. *Id.* at 878. Second, NHTSA implemented a gradual phase in of the passive restraints, requiring them on only 10 percent of 1987 models and increasing the percentage until it reached 100 percent for the 1990 model year. *Id.* at 879.

The court was also sensitive to some of NHTSA's concerns that led it to create the phase in scheme as opposed to requiring a specific type of system on all cars. Those concerns included the fact that since passive restraints were relatively new to the marketplace, it was not known how the public would react to the various systems, and NHTSA wanted to allow manufacturers time to experiment with a variety of systems in order to find the best ones. *Id.* at 877-79. Honda argued that the plaintiff's no airbag claim conflicted with this passive restraint phase in scheme and was therefore preempted by FMVSS 208.

First and most significantly, *the Supreme Court unanimously found that the Safety Act did not expressly preempt the plaintiff's claim. Id.* at 868. Honda had urged express preemption under the Safety Act's preemption provision. 15 U.S.C. § 1392(d). The Court, however, rejected this argument, relying on the Safety Act's "savings clause," which states: "Compliance with any [FMVSS] shall not exempt any person from any liability under common law." 15 U.S.C. § 1397(k); *Geier, supra,* 529 U.S. at 867-68. This language, the Court held, was specifically intended to "leav[e] adequate room for state tort law to operate – for example, where federal law creates only a floor, *i.e.*, a *minimum safety standard.*" *Id.* at 868 (emphasis added). Thus, under *Geier,* if a federal safety standard constitutes a floor or minimum standard, conflict preemption will ordinarily not apply because the Safety Act's savings clause "preserves those actions that seek to establish greater safety than the

minimum safety achieved by a federal regulation intended to provide a floor." 529 U.S. at 871.

This holding is critical because it made clear that the vast majority of automotive defect cases are not preempted because most FMVSS's create "only a floor, i.e., a minimum safety standard." *Id.* at 868. This holding is consistent with the Supreme Court's subsequent interpretation of other federal statutes with similar preemption provisions. See *Bates v. Dow Agrosciences LLC*, (2005) 544 U.S. 431 (plaintiffs claims against manufacturer of pesticide are not preempted by the labeling provision of Federal Insecticide, Fungicide, and Rodenticide Act because of its savings clause); *Sprietsma v. Mercury Marine*, (2002) 537 U.S. 51 (plaintiffs state common law claims against manufacturer of outboard motors were neither expressly nor impliedly preempted the [sic] Federal Boat Safety Act because the savings clause of the FBSA specifically preserved liability under state common law).

In spite of the savings clause, a five-member majority of the Supreme Court decided to apply implied preemption principles to the Safety Act and the FMVSS. *Geier, supra,* 529 U.S. at 874. The Court held that if a tort claim "actually conflicts" with the FMVSS, then it is preempted. *Id.* A claim actually conflicts when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 873. Applying these principles, the court found that the plaintiff's no

airbag claim actually conflicted with FMVSS 208. *Id.* at 874.

In short, the basis on which the Court found preemption was extremely narrow. Specifically, the Court found a conflict with FMVSS 208 based on the detailed NHTSA policy behind the passive restraint phase-in scheme. According to the Court, plaintiff's no airbag claim aimed at the 1987 Accord was the equivalent of requiring all 1987 model year vehicles to be equipped with an airbag. *Id.* at 881. The Court was concerned that such an "all airbag" rule in 1987 would have "presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* The Court had noted that NHTSA wanted this variety to "help develop data on comparative effectiveness" and to "facilitate the development of alternative, cheaper, and safer passive restraint systems." *Id.* at 862.

Thus, in all preemption motions relying on *Geier*, the focus must be on this narrow predicate of the court's ruling. The Court did not find that tort claims are preempted merely because there is a FMVSS covering the component at issue or providing options to manufacturers. The Court limited its holding to those cases where the claim would actually conflict with the stated purpose and goals of NHTSA.

E. The Government's Amicus Brief in *Geier*

In order to properly understand parameters of the Supreme Court's ruling, it is also important to

note that the court relied heavily on the position of the United States Government in its amicus brief. See Brief for the United States as Amicus Curiae Supporting Affirmance ("U.S. Brief"), 1999 WL 1045115. The Court found the government's positions persuasive because, according to the Court, they represent the Department of Transportation's interpretations of its own standards. *Geier, supra*, 529 U.S. at 883-84. In fact, a comparison of the amicus brief and the opinion shows that the court's rationale was adopted almost wholesale from the government's brief.

Like the court, the government took a very narrow stance on preemption by stating that automotive design defect cases are not preempted merely because they require more than the minimum federal standard. U.S. Brief, 1999 WL 1045115, at *21. Significantly, the government took the position that *such claims are not preempted merely because the standard provides multiple options from which a manufacturer can chose* [sic] *in designing its cars. Id.* at *21-22.

F. California and the Ninth Circuit

There are currently no published California State or Ninth Circuit cases applying *Geier* to an automotive defect case. However, the Ninth Circuit and district courts have distinguished *Geier* in other contexts.

Shortly after *Geier* was decided, the Ninth Circuit applied it in a non-auto context. In *Leipart v.*

Guardian Industries (9th Cir. 2000) 234 F.3d 1063, the plaintiff alleged he was injured due to defects in a shower door that caused it to break into long, dangerous shards rather than into small, relatively harmless pieces. *Id.* at 1065-66. The defendant argued such claims were preempted by the federal Consumer Product Safety Act ("CPSA"). Like the auto Safety Act, the CPSA calls for the promulgation of standards similar to the FMVSS, and one of those standards specifically addresses the manner in which shower doors must break if subjected to a certain force. *Id.* at 1066. The CPSA also contains an express preemption clause and savings clause almost identical to the auto Safety Act. *Id.* at 1066-67.

Like *Geier*, the *Leipart* court first held that the CPSA did not expressly preempt the plaintiff's claims. *Id.* at 1069. The court then went on to distinguish *Geier* and hold that the CPSA also did not impliedly preempt the claims. *Id.* at 1069-70. In doing so, the court cited to the fact that *Geier* relied upon NHTSA's stated policies behind the phase-in provisions of FMVSS 208. *Id.* at 1069. The CPSA is different because it merely created a "floor" or minimum standard above which state law could impose further duties. *Id.* at 1070.

Similarly, in *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 672 (9th Cir., 2003), the Ninth Circuit distinguished *Geier* in the context of a case implicating the Clean Air Act:

"Geier is distinguishable from this case on two grounds. First, in Geier, the relevant regulating agency, in interpreting its own governing statute, had decided that the suit was preempted, and the Supreme Court gave deference to the agency's determination. See id. at 883-84. Here the EPA has made no such determination. Second, the Supreme Court in Geier found abundant evidence in the administrative history of the FMVSS to indicate that it was intended to give auto manufacturers a choice of safety restraints. See id. at 875-83. We can find no evidence that the Clean Air Act was intended to give gasoline producers a comparable choice of oxygenates. Indeed, we have already specifically held in Exxon Mobil that HN16the [sic] legislative history of the Clean Air Act does not support a conclusion that Congress meant to give gasoline producers an unconstrained choice of oxygenates. For these reasons, several courts have already rejected Geier-based preemption challenges to MTBE regulations."

The Northern District of California has also properly applied a narrow reading of *Geier* in two decisions denying motions to dismiss automobile class actions. See *Kent v. DaimlerChrysler Corp.* (N.D. Cal. 2002) 200 F.Supp.2d 1208, 1210; *Chamberlain v. Ford Motor Company*, (N.D. Cal. 2004) 314 F.Supp.2d 953.

In *Kent*, the plaintiffs brought a class action alleging that certain model year Jeep Grand Cherokees

have a design defect, which causes them to self-shift from park to reverse. *Kent, supra*, 200 F.Supp. at 1210. DaimlerChrysler argued that plaintiffs' claims were preempted by FMVSS 102, which addresses transmission issues. The court, citing *Geier*, rejected that argument. It noted the *Geier* court's reliance on the history of FMVSS 208 and NHTSA's stated desire to encourage a mix of passive restraint systems. *Kent, supra*, 200 F.Supp. at 1215. By contrast, the court found no such policy rationale in FMVSS 102. *Id.* at 1216.

Likewise, in *Chamberlain*, the court engaged in a proper interpretation of *Geier* and denied Ford's motion to dismiss a class action complaint. The court found that *Geier's* preemption holding was based on the history of FMVSS 208 and that "the Department of Transportation's carefully considered policy decision to allow gradual introduction of safety devices better to meet safety needs and accommodate manufacturers and the public." *Chamberlain, supra*, 314 F. Supp. 2d at 963. Like *Kent*, the court found no such "considered choice" at issue in that case. *Id.* ("*Geier* is distinguishable because there is no substantive regulation at issue in the instant case nor is there language in the MVSA or its legislative history demonstrating that exclusive federal agency administration of injunctive remedies in the field of motor vehicle safety was the considered policy choice of Congress.")

These decisions demonstrate that that [*sic*] the Ninth Circuit and California acknowledge the limited

scope of *Geier*. These courts recognize that the FMVSS do not preempt state tort claims that simply hold the manufacturers to higher standards than the bare minimum required by the FMVSS.

G. PLAINTIFFS' claims regarding the lack of a three-point seat belt are not impliedly preempted by FMVSS 208.

PLAINTIFFS' seat belt claims are not preempted here simply because PLAINTIFFS seek to hold MAZDA to a higher standard than the minimum standard set forth in FMVSS 208. See *Leipart, supra,* 234 F.3d at 1070. Examples of FMVSS that establish minimum performance standards are those dealing with roof crush (FMVSS 216) and seat back strength (FMVSS 207). Some published cases provide additional examples.

In *Harris v. Great Dane Trailers* (8th Cir. 2000) 234 F.3d 398, the plaintiff alleged inadequate reflective tape on the back of a truck. FMVSS 108 governs reflective devices on the back of trucks. The court found no preemption because FMVSS 108 only set a minimum standard. *Id.* at 401-02. The court also found that the lack of specific tape configuration requirements did not preempt the claim because it did not constitute a federally granted "option" like the standard at issue in *Geier*. Rather, it simply "left the industry where it was before – free to make voluntary decisions" about safety devices. *Id.* at 402-03.

The mere existence of options in FMVSS 208 does not mean that a claim based on the choice of one of those options is preempted. The government took this position in its amicus brief for *Geier* by stating that even though FMVSS 125 gave manufacturers multiple options for the design of reflective devices on stopped vehicles, NHTSA did not determine that the availability of these options was necessary to promote safety. U.S. Brief, 1999 WL 1045115, at *21-22. In other words, the "options" at issue in that case were part of a unique phase-in scheme that sought a mix of systems. Absent such a specific regulatory history promoting the mix of options, preemption cannot apply.

This is the lesson of *Geier* itself (which relied on a highly unusual regulatory history as the basis for its preemption holding, *not* on the fact that the regulation created various options) and of the United States' own consistent litigating position that mere regulatory options do not, in and of themselves, exert any preemptive effect. If the mere existence of regulatory options were sufficient to preempt tort claims, then *Geier* would not have even needed to address the complex policy reasons underlying the 1984 version of FMVSS 208; it would have been sufficient to point out that the car maker in that case (Honda) had chosen to install one of several permitted regulatory options, and that the chosen option did not require an airbag. *Geier*, however, never purported to rely on such an observation, making clear that regulatory options,

standing alone, do not exert any preemption force under the Safety Act.

Contrary to MAZDA's assertion, there is no basis for concluding that this lawsuit would undermine some special federal policy with respect to rear-center seats. This case is inapposite from *Geier,* which involved a version of FMVSS 208 that required car manufacturers to install either airbags or some other form of passive restraint in the front seats of passenger cars. The accompanying regulatory preamble made clear that the reason the federal government gave car makers the choice of installing various types of passive restraints was to ensure that car manufacturers installed a mix of different devices in the front seats of cars, in part to avoid a massive public backlash against airbags. Given this fear of airbags, NHTSA had the specific goal of ensuring that some cars include forms of passive restrains [sic] *other than* airbags. *Geier* held that, in light of this unique goal, a jury verdict holding a manufacturer liable for its failure to install an airbag would undermine federal policy by pushing car makers to install airbags in all their cars.

This federal policy has no application here. In contrast to the hotly-debated airbag, the lap/shoulder belt has always been required equipment in the front seats of passenger cars (and since 1989, in the rear outboard seats). Given this history, there is no basis for concluding that NHTSA affirmatively sought to induce manufacturers to build some number of cars that did not include lap/shoulder harnesses in the

rear-center seats. And the regulatory history of the options standard at issue does not contain a *single reference* to the type of "technological diversity" goals at issue in *Geier*.

Nor is there any merit to MAZDA's contention that the federal government's 1989 decision to not require lap/shoulder belts in rear-center seats would be undermined by this lawsuit. This decision was not based on any conclusion that lap/shoulder belts would be unsafe or undesirable in that seating position. To the contrary, NHTSA repeatedly stated that lap/shoulder belts were the safest form of seat belt technology, and it affirmatively *required* lap/shoulder belts in all other seating positions. Instead, the agency's decision to not require lap/shoulder belts in rear-center seats was based on its concerns about the technical difficulties of requiring lap/shoulder belts in all cars and the economic burden such a universal rule would impose on car makers. The U.S. Supreme Court, however, has made it clear that *these sorts of concerns cannot form the basis for a finding of implied preemption*. See *Sprietsma, supra*, 537 U.S. 51.

H. The out-of-state federal cases relied upon by MAZDA have no precedential or persuasive authority here.

In addition to its erroneous reliance on *Geier*, MAZDA cites on a number of cases that do not support its position. MAZDA principally relies on *Griffith v. General Motors Corp.*, 303 F.3d 1276 (11th Cir.

2002), which found implied conflict preemption of the plaintiff's claim that General Motors was negligent for failing to provide a shoulder belt along with a lap belt in the front-center seat of a car. *Griffith*, however, is flawed at its core and should not be given any consideration by this Court.

First and foremost, *Griffith* was decided before the U.S. Supreme Court decided *Sprietsma*, 537 U.S. at 51. As explained above, *Sprietsma* makes clear that an agency's decision not to require a particular safety feature based on its view that the costs of a universal regulatory requirement might exceed the safety benefits does not preempt common-law claims seeking to hold a manufacturer liable for not installing that safety feature in a particular vehicle. In light of *Sprietsma*, the decision in *Griffith* is clearly wrong.

Second, *Sprietsma* aside, *Griffith* lacks any persuasive authority because it rests on an erroneous factual assumption that renders the entire decision invalid: that the federal government's "technological diversity" goal applied to *both* manual seat belts and passive restraints. In its decision, the Third Circuit asserted that "DOT intended and expected FMVSS 208 to produce a mix of restraint devices, *both passive and manual*, in cars and trucks." 303 F.3d at 1281 (emphasis added). As support for this proposition, *Griffith* relies exclusively on the U.S. Supreme Court's decision in *Geier*. *See id.* (citing *Geier*, 529 U.S. at 879). However, as explained above, *Geier* merely discussed the federal government's technological diversity goal with reference to *passive* restraints, and the

Supreme Court never suggested that NHTSA had similar goals with respect to manual restraints in the rear seats of vehicles. This is not surprising, given that MAZDA itself has failed to unearth any regulatory materials that even hint – let alone demonstrate – that NHTSA ever intended to promote a diverse array of manual restraints in the rear-center seats of passenger cars. This core factual error strips *Griffith* of any even arguable validity.

Third, *Griffith* is distinguishable on its facts. *Griffith* involved claims that a pickup truck was defectively designed because its *front* center seat lacked a lap/shoulder belt. 303 F.3d at 1278. This is an entirely different issue than this case, which involves the *rear* center seat of a passenger car. The 1989 rulemaking that is the centerpiece of MAZDA's preemption argument here was not at issue in *Griffith*, because that rulemaking did not address the front seats of cars. Thus *Griffith* involved a different type of claim; a different options standard; and an entirely different regulatory history than this lawsuit – all reason enough to reject any reliance on the decision outright.

Hurley v. Motor Coach Inds., 222 F.3d 377 (7th Cir. 2000), *cert. denied*, 531 U.S. 1148 (2001) is also inapposite. There, a bus driver sued a bus manufacturer for failing to do more than install a two-point lap belt in his seat, which was the minimum safety feature required by federal law. (The governing version of FVMSS 208 gave the manufacturer the option of installing either a full "passive" system or

installing *either* a lap belt or a lap/shoulder belt.) With respect to the claim that the seat should have had a lap/shoulder belt, the Seventh Circuit focused on the fact that NHTSA had expressed concern that *heavy vehicle operators* – *e.g.*, bus drivers – have a particularly "strong aversion" to using seatbelts of any kind. *See id.* at 382. Based on this evidence of seatbelt "aversion" among heavy vehicle operators, *Hurley* concluded that NHTSA's decision to permit installation of the less-restrictive two-point lap belt (as opposed to the more confining three-point lap/shoulder belt) was specifically designed to "promot[e] safety by encouraging drivers to use the safety equipment that manufacturers install." *Id. Hurley* ultimately held that, "as in *Geier,* the decision to leave options open to bus manufacturers *was made with specific policy objectives in mind.* Hurley's suit, if successful, would undermine that policy objective and is therefore preempted." *Id.* (emphasis added).

No such "specific policy objectives" could possibly be implicated by this lawsuit. *Hurley*'s reasoning would only apply here if NHTSA's decision to give *car makers* the choice of installing lap belts instead of lap/shoulder belts in rear seats was based on a desire to avoid aggravating the public's "aversion" to seatbelts. But the history of FMVSS 208 as it applies to *cars* – and not buses – itself disproves any such conclusion. As previously explained, Standard 208 has *always* required three-point lap/shoulder belts in the front driver's and passenger seats of cars. It is therefore apparent that, in NHTSA's view, a three-point

system has always been the safest form of manual restraint in *cars*, where the risk of driver "aversion" to seatbelts has not been an issue. Given that there was no evidence of driver "aversion" to seatbelts that influenced NHTSA's rulemaking with respect to the front seats of cars, it would make no sense to assume that any such concern animated the agency's decision to create a regulatory option with respect to the rear seats of cars. Instead, the rear-seat option can best be understood as reflecting the agency's view (as set forth in the regulatory preamble) that, because rear seats are generally safer and less frequently occupied than front seats, there was no reason to mandate three-point lap/shoulder belts for all rear-center seats.21 [sic] Thus, none of the policy objectives at issue in *Hurley* has any application to this lawsuit.

MAZDA also cites two cases – *Carasquilla v. Mazda Motor Corp.*, 166 F. Supp. 2d 169 (M.D. Pa. 2001), and *Hernandez-Gomez v. Volkswagen of American* [sic], *Inc.*, 32 P.3d 424 (Ariz. App. Div. 2001) – that have no bearing here because, like *Geier*, they involved claims that a car maker was negligent for choosing one of the particular forms of *passive* restraints permitted by FMVSS 208.[1] As in *Geier*, these

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[1] In *Carasquilla*, the car at issue was equipped with one of the passive-restraint options that was specifically permitted by the version of Standard 208 at issue in *Geier*: an automatic lap/shoulder harness and a manual lap belt. The plaintiff contended that this system was defectively designed because, *inter alia*, it should have included an "integrated automatic lap belt." *Id.* at 174. Relying on *Geier*, the Court held that the claim was

(Continued on following page)

claims arguably would have interfered with the federal government's goal of encouraging a mixture of different *passive* restraint technologies in passenger cars. This concern is not present in cases, like this one, that involve the installation of *manual* restraints in the rear seats of passenger cars, which were specifically exempted from the passive-restraint requirements at issue in *Geier*.[2]

In sum, there is no basis for this Court to find implied conflict preemption of plaintiffs' no-lap/shoulder-belt claim. The core teaching of *Geier* is that conflict preemption only exists where the common-law claims would directly undermine federal purposes. Try as it might, MAZDA has failed to identify

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preempted because it "was a direct challenge to the passive restraint system available to . . . defendants under Standard 208" and thus "is no different from petitioners' claim in *Geier*." *Id.* at 176.

Similarly, in *Hernandez-Gomez*, the car at issue was equipped with a passive restraint option that was specifically permitted by Standard 208: a automatic shoulder belt that did not include a manual lap belt. The plaintiff contended that the system was defectively designed because it did not have a lap belt. The Arizona Court of Appeals disagreed, holding that, under *Geier*, the plaintiff's claims would interfere with the federal government's goal of giving car manufacturers a choice of *passive* restraint options.

[2] MAZDA's reliance on *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998) is misplaced for the same reason because it involved claims that a car maker was negligent for choosing one of the *passive* restraint options permitted by FMVSS 208 (an automatic shoulder harness and an automatic lap belt).

even a single federal purpose that would be undermined or frustrated by a jury verdict holding it liable in this case. Especially in light of the strong presumption against preemption, MAZDA's preemption defense must fail.

V. PLAINTIFFS' FAILURE TO WARN CLAIM REGARDING THE SEAT BELT IS AN INDEPENDENT LEGAL THEORY THAT CANNOT BE PREEMPTED.

It is MAZDA's burden to demonstrate preemption. *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 956-957. MAZDA must establish plaintiff's failure to warn claim (SAC ¶ 21, 22, 40, 47.) was premised on a preempted design defect theory. As demonstrated above, MAZDA has failed to carry that burden.

Under California law, a failure to warn claim is an independent legal theory that does not require any showing of design defect. See *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1110-1113. "Even though the product is flawlessly designed and manufactured, it may be found defective within the general strict liability rule and its manufacturer or supplier held strictly liable because of the failure to provide an adequate warning." *Persons v. Salomon North America, Inc.* (1990) 217 Cal.App.3d 168, 174. The jury "'must decide whether a product flawlessly designed and produced may nevertheless possess such risks to the user without a suitable warning that it becomes "defective" simply by the absence of warning.'" *Finn*

v. G.D. Searle & Co. (1984) 35 Cal.3d 691, 699, quoting *Cavers v. Cushman Motor Sales, Inc.* (1979) 95 Cal.App.3d 338, 347.

Here, PLAINTIFFS' failure to warn claims are not premised on MAZDA's failure to use lap/shoulder belts for the rear center seat. To the contrary, PLAINTIFFS allege MAZDA failed to warn them about the dangers of using a lap-only belt, about the dangers of the defective rear seat back, and about the dangers inherent in the angle and geometry of the seat bottom. (RFJN, Exs. 1 and 2.)

VI. IF THE COURT SHOULD GRANT THIS MOTION, IT MUST GIVE PLAINTIFFS LEAVE TO AMEND.

If the court concludes that the complaint does not state a claim, but there is a reasonable possibility that the defects can be cured by amendment, leave to amend must be granted. *Stevens v. Superior Court* (1999) 75 Cal. App. 4th 594, 601. In fact, "liberality in permitting amendment is the rule." *Angie M v. Sup. Ct.* (1995), 37 Cal.App.4th 1217, 1227. Courts are very liberal in permitting amendments, not only where a complaint is defective in form, but also where substantive defects are apparent. *Von Batsch v. American Dist. Telegraph* (1985) 175 Cal.App.3d 1111, 1119. A denial of leave to amend constitutes an abuse of discretion. *Goodman v. Kennedy* (1976), 18 Cal.3d 335, 349; *Okun v. Maple Properties* (1981), 29 Cal.3d 442, 460.

"[T]here is a strong policy in favor of liberal allowance of amendments." *Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945. Moreover, "[i]t is an abuse of discretion to deny leave to amend where the opposing party was not misled or prejudiced by the amendment." *Id.* (citation omitted). Similarly, it is "irrelevant that new legal theories are introduced as long as the proposed amendments 'relate to the same general set of facts.'" *Id.* (citing, *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048).

Here, PLAINTIFFS' subsequently discovered that the angle and geometry of the seat bottom and integrity of the seat back of the rear seat in which Thanh and Alexa Williamson were seated during the accident were also defective and contributed to their injuries. PLAINTIFFS put defendants on notice of these defects in discovery responses served on June 17, 2005. (RFJN, Ex. 2, at 4.) Therefore, if the Court grants this motion, PLAINTIFFS must be given leave to amend the complaint to add allegations concerning these defects because they are concurrent causes of Thanh Williamson's injuries and death and arise from the same general set of facts set forth in the Second Amended Complaint.

VII. CONCLUSION

For the foregoing reasons, Defendant MAZDA's motion for judgment on the pleadings must be denied in its entirety.

DATED: June 22, 2006

GIRARDI | KEESE

By: /s/ David Lira
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[Proof Of Service Omitted In Printing]

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, Inc., a California corporation; FORD MOTOR COMPANY, a Delaware corporation; AUTOMATIC	**CASE NO. 04CC06494** **Assigned:** **Hon. Michael Brenner** **Department: C20** **DEFENDANT MAZDA MOTOR COPORATION'S REPLY TO PLAINTIFFS' OPPOSITION TO MAZDA'S MOTION FOR JUDGMENT ON THE PLEADINGS** **[CCP 438 and common law]**

EQUIPMENT MANUFACTURING COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive, Defendants.	**VIA FAX** **Date: July 6, 2006** **Time: 1:30 p.m.** **Dept.: C20** Action Filed: 7/07/04 Trial Date: 8/07/06 Motion Cutoff: 7/23/06 Discovery Cutoff: 7/08/06

TO ALL PARTIES AND THEIR COUNSEL OF RECORD HEREIN:

Defendant Mazda Motor Corporation ("MC") hereby files its Memorandum of Points and Authorities in reply to Plaintiffs' Opposition to Mazda Motor Corporation's Motion for Judgment on the Pleadings as follows:

MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY

I. INTRODUCTION: AS EVEN PLAINTIFFS ACKNOWLEDGE, FOR 36 YEARS, NHTSA MADE AND MAINTAINED ITS CONSIDERED DECISION TO GIVE MANUFACTURERS A CHOICE OF RESTRAINTS IN REAR CENTER SEATS

Notwithstanding all the procedural infirmities of Plaintiffs' late served, oversized, inaccurate reply brief, and the inappropriate matters of which Plaintiffs half-heartedly seek judicial notice, one thing remains clear and uncontroverted even by Plaintiffs:

For 25 years before this 1993 Mazda MPV was manufactured, and for 11 years after it, NHTSA, the agency Congressionally charged with promulgating motor vehicle safety standards, considered and found that in furtherance of its policy goals, it should offer manufacturers a choice of whether to use a lap belt (a "two-point" or a "Type 1") or a lap/shoulder-belt ("three-point" or "Type 2") in the rear center seat of vehicles such as this van.

Plaintiffs erroneously suggest that no policy reasons for NHTSA's decision exist. Those policy reasons are explicated in the NHTSA history and noted at page 10 of MC's Motion and concern the "technical difficulties associated with anchoring the shoulder portion of the belt at the center seating position." See Request for Judicial Notice accompanying Motion, Exhibit "B."

Now, Plaintiffs want a California court to overrule NHTSA's policy decisions, and impose tort and even punitive damages, for MC exercising the choice that Congress, through NHTSA, gave it. Little could be more obstructive to NHTSA's policy decisions (to provide an option) than to impose tort, compensatory and punitive damages against an entity that follows one option instead of the other.

Plaintiffs cite a number of Ninth Circuit and district court cases to distinguish *Geier v. American Honda Motor Company, Inc.*, yet each case declined to follow *Geier* only because, in those cases, the

allegedly preempted regulation did not provide options.

Here, just as in *Geier,* NHTSA provided options that would result in a mix of selections. This Court cannot, and should not, permit a claim based mainly on MC's selection of a lap belt instead of a lap/shoulder belt. From the Second Amended Complaint, there can be little doubt that the lap belt vs. lap/shoulder belt decision is at the heart of Plaintiffs' claims about the injuries suffered by Thanh Williamson while riding in the rear center seat. As such, MC's judgment on the pleadings with respect to those injuries should be granted.

II. PLAINTIFFS' OPPOSITION AND REQUEST FOR JUDICIAL NOTICE ARE PROCEDURALLY IMPROPER AND SHOULD BE STRICKEN

Plaintiffs' Opposition not only relies upon misinterpretation of precedent and instructive authority, but it also is procedurally defective in several regards. First, Plaintiffs obviously recognize the importance of this motion, as they filed an excessively long brief and attempted to assert items that are not judicially noticeable. California Rules of Court rule 313 provides for a procedure by which Plaintiffs could have sought this Court's permission, yet they ignored it.

C.C.P. section 1005, subdivision (c) required that the Opposition be served in a manner "reasonably

calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers, as applicable, as filed." Plaintiffs ignored that rule as well, simply mailing the Opposition, which was not received until 4 days later – essentially a day and a half before this Reply was due.

Further, obviously recognizing the problems with the content of their Second Amended Complaint, Plaintiffs improperly referenced interrogatory responses to support their opposition. Under section 438(d), only matters in a pleading, or of which the Court may take judicial notice, are properly before the Court; interrogatory responses are neither a pleading nor judicially noticeable. Notably, Plaintiffs offer no explanation as to why a year has passed and the Complaint has not been amended, or even how they would amend the Complaint to avoid the preemption issue.

Further, three of the four items for which the Plaintiffs seek judicial notice are not judicially noticeable. (See Defendant Mazda Motor Corporation's Objections concurrently filed.) In addition to interrogatories being excluded from consideration, the NTSB letter, discussed at length in the Opposition, has no bearing on NHTSA's action and cannot be considered. It is most telling that Plaintiffs make no effort to tie the NTSB safety recommendations to any NHTSA action. And the NTSB document itself notes that it refers to a study which "is limited," and notes that "the small size of the sample in this study

means that no statistically valid conclusions can be drawn from it." Plaintiffs' Exh. 3, p. 2. Finally, the NHTSA report (Exhibit 4) is not something of which the Court can take judicial notice. Plaintiffs have not explained how a June 1999 report could impact a vehicle that was manufactured in 1992 or 1993.

III. PLAINTIFFS' PREEMPTED CLAIM IS THE HEART OF THEIR CAUSES OF ACTION ARISING FROM THANH WILLIAMSON'S INJURIES

As is clear from paragraph 2 of Plaintiffs' Second Amended Complaint, the claims arising from the injuries to and wrongful death of Thanh Williamson are founded on a claim that she "jackknifed" around her seat belt. (They allege she "was killed when the forces generated by this collision caused her body to 'jackknife' around her defective lap belt, causing severe abdominal injuries and internal bleeding.") Plaintiffs' interrogatory responses, identifying facts to support their contention that the injuries would not have been severe but for certain claimed wrongful conduct, confirm the essential nature of this claim:

> "[a] lap-shoulder belt would have prevented PLAINTIFFS ALEXA WILLIAMSON and THANH WILLIAMSON from 'jackknifing' over the lap belt and thus prevented severe abdominal injuries."

The other claims, concerning a better designed seat belt and a seat back, are based on the

lap/shoulder belt claim, since Plaintiffs do not allege they caused the injury, but rather that they further exacerbated the injury caused by the jackknifing.

The Court thus can properly grant judgment on the pleadings to the preempted claims. Moreover, in cases like this, it can grant judgment on less than the entire claim. As is obvious from the parties' trial estimates and the numerous theories asserted, this is a complex claim. In complex matters, a "trial court has broad discretion . . . to fashion suitable methods of practice in order to manage complex litigation." *Fire Ins. Exch. v. Superior Court* (2004) 116 Cal.App.4th, 446, 452 (citing *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967. The Fire Ins. Exch. court found that granting a motion for judgment on the pleadings for less than an entire cause of action was permissible. Whether the preempted claims are the essence of Plaintiffs' causes of action, or merely part of a complex claim, the Court should grant judgment on them.

IV. PLAINTIFFS MISUNDERSTAND AND MISREPRESENT THE HOLDING AND SCOPE OF *GEIER V. AMERICAN HONDA* AND CASES INTERPRETING IT

Not surprisingly, Plaintiffs' first inaccurate representation of the *Geier* decision appears on the first page of their Opposition. There, Plaintiffs remarkably assert that their "claims arising out of the lack of a lap/shoulder belt in the rear center seat are

expressly and unequivocally exempted from federal preemption by the 'savings' clause of the Federal Motor Vehicle Safety Act." Opp. at 1:19-21. Of course, even Plaintiffs were later forced to admit that was not the holding of *Geier,* and that *Geier* specifically found implied preemption prohibited Geier's case against American Honda. *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861. *See* Opp. at 8, citing *Geier, supra,* 529 U.S. at 874. Indeed, conflict preemption is all that this Motion is focused upon – the Plaintiffs' attempt to have this Court impose tort liability for the manufacturer's selection of one, and not the other, of the rear center safety belt options provided by NHTSA.

Throughout the Opposition, Plaintiffs assert that Geier should be narrowly interpreted and applied sparingly. This is ironic given the number of times that Geier has been cited for guidance, whether or not a court finds that preemption is warranted.

> *Geier is* not a narrow holding limited to automobile safety standards; instead it established a general rule upholding conflict preemption even if the applicable federal law contains a savings clause.

Dowhal v. Smithkline Beecham Consumer Healthcare (2004) 32 Cal.4th 910, 926 (citing *Sprietsma v. Mercury Marine* (2002) 537 U.S. 51, 63.) It is no small irony that the *Dowhal* court relied on *Sprietsma* – a case which Plaintiffs cited for the exact opposite proposition.

Plaintiffs attempt to limit *Geier* by referencing inapposite Ninth Circuit and District Court opinions. First, Plaintiffs cite *Leipart v. Guardian Industries* (9th Cir. 2000) 234 F.3d 1063 which concerned glass breakage safety standards for shower doors – a "non-auto context." What is critical about *Leipart* was that the plaintiff's claims there were *not* based upon an assertion that the shower door manufacturer chose one type of glass when it should have chosen another. No "wrong choice" claim was made.

This issue – whether a plaintiffs claims are based on the defendant's selection of regulation- provided options – was central also in the *Oxygenated Fuels Ass'n v. Davis* (9th Cir. 2003) 331 F.3d 665, 672 decision that Plaintiffs cite. As quoted by Plaintiffs, the *Oxygenated Fuels* court distinguished its facts from *Geier*.

> "Second, the Supreme Court in *Geier* found abundant evidence in the administrative history of the FMVSS to indicate that it was intended to give auto manufacturers a choice of safety restraints. *See id.* at 875-83. We can find no evidence that the Clean Air Act was intended to give gasoline producers a comparable choice of oxygenates."

See Plaintiffs' Opposition at 10.

Thus, even the Plaintiffs' own authority shows two critical points. First, *Geier* is applicable outside the air bag/no air bag context. Second, the critical factor for whether *Geier* preemption applies is whether

there was an intention by the regulation to provide options to the defendant. It is clear that FMVSS 208 gave MC the option of installing a lap/shoulder-belt, or lap belt, in the rear center seat.

Similarly, *Kent v. DaimlerChrysler Corp.* (N.D. Cal. 2002) 200 F.Supp. 2d 1208, 1210 and *Chamberlan v. Ford Motor Company* (N.D. Cal. 2004) 314 F.Supp. 2d 953 prove, rather than disprove, the viability of *Geier* and its applicability to this matter. In *Kent,* the court succinctly indicated why *Geier* was inapplicable:

> Defendant has pointed to nothing, either in the regulation or in the history of the regulation, suggesting that Plaintiffs' lawsuit frustrates the purpose of FMVSS 102. In contrast to the standard at issue in *Geier,* FMVSS 102 does not give manufactures [*sic*] a choice with respect to transmission design.

Kent, supra, 200 F.Supp. 2d at 1215. The *Kent* court could not have made it any clearer that it viewed *Geier* as turning on whether a manufacturer exercised a NHTSA-provided choice.

Chamberlan involved a class action concerning allegedly defective intake manifolds, and whether injunctive relief under the California Unfair Competition Law was preempted by federal law. As Plaintiffs here admit, the *Kent* court found that there was no substantive regulation at issue in its case. *Id.* at 11 (citing *Chamberlan, supra,* 314 F.Supp. 2d at 963). The *Kent* court's discussion of *Geier* immediately

preceding the portion quoted in Plaintiffs' opposition is even more instructive:

> As the result of a considered policy choice, under FMVSS 208, manufacturers had no duty to install air bags at the time they manufactured the plaintiffs' car, yet the *Geier* plaintiffs' tort claims relied upon precisely such a duty. [Citing *Geier* at 529 U.S. at 881.] The Court held that allowing a State law tort claim to proceed under these circumstances would in effect impose a safety standard upon manufacturers different than that imposed by the Department of Transportation's well-considered regulation.

Chamberlan, supra, 314 F.Supp. 2d at 963 (citing *Geier, supra,* 529 U.S. at 881.)

If one were to substitute the air bag discussion for one concerning shoulder/lap belts, the *Kent* court's description of *Geier* is equally applicable here. NHTSA made a considered policy choice under FMVSS 208, so manufacturers like MC had no duty to select a lap/shoulder belt over a lap belt; NHTSA said it could choose *either* one. Allowing the Plaintiffs here to have a state law claim based upon the choice of one safety belt system over another would impose "a safety standard upon manufacturers different than that imposed by the Department of Transportation's well-considered regulation."

V. NHTSA'S PURPOSES WOULD BE FRUSTRATED BY BANNING ALL TYPE 1 BELTS

Despite the length of their Opposition, Plaintiffs ignore NHTSA's history of specifically allowing a combination of Type 1 and Type 2 belts in vehicles to ensure occupant safety with adults, adolescents and young children. This is particularly surprising since NHTSA's purposes are set out in the NHTSA very regulations which Plaintiffs cite in their Opposition.

NHTSA's decision to provide a Type 1 option was deliberate. In fact, in the late 1980's, when it mandated lap/shoulder belts for rear *outboard* seating positions, NHTSA decided *not* to require lap/shoulder belts in rear non-outboard seating positions. See 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989); 53 Fed. Reg. 47982, 47984-47985 (Nov. 29, 1988). In deciding to maintain the existing option for either lap belts or lap/shoulder belts in rear non-outboard positions, NHTSA focused on a number of important policy concerns.

First, NHTSA concluded that technical and cost issues weighed decisively against a lap/shoulder belt requirement for rear non-outboard seating positions. NHTSA noted that a number of commenters had objected to the structural changes that would be needed for lap/shoulder belts in rear non-outboard seating positions. *See* 53 Fed. Reg. at 47984. Others pointed out the high costs and small anticipated benefits that rear center lap/shoulder belts would provide. *Id.*

The American Seat Belt Council had pointed out, *inter alia,* that lap/shoulder belts in rear center seating positions had "little field testing." *Id.* Other commenters noted that there would be difficulties in locating the anchorage for a rear center lap/shoulder belt in a variety of vehicles. The anchorages in hatchbacks or station wagons would have to be located either in the loadspace floor (disrupting the cargo carrying area) or on the vehicle roof (which would impede the driver's rearward vision). *Id.*

In the preamble to the November 1989 final rule on lap/shoulder belts in rear seating positions, NHTSA reiterated its conclusion that the lap/shoulder belt requirement should apply only to rear outboard seating positions, noting that:

> [s]ome commenters suggested that technologies and designs are available to provide lap/shoulder belts at rear center seating positions, and that NHTSA should further examine this issue. The agency explained in the NPRM that there are more technical difficulties associated with any requirement for lap/shoulder belts at center rear seating positions, and that lap/shoulder belts at center rear seating positions would yield small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task. Accordingly, this rulemaking excluded further consideration of a requirement for center rear seating positions. None of the commenters presented any new data

> that would cause the agency to change its tentative conclusion on this subject that was announced in the NPRM.

54 Fed. Reg. at 46258.

NHTSA had also been concerned about the compatibility between child safety restraints and a requirement that lap/shoulder belts be provided at all rear designated positions. As noted above, the consistency between restraint requirements and child safety has been a recurring them [sic] in FMVSS 208 rulemakings. Thus, in denying the 1984 petition to require lap/shoulder belts at outboard rear seating positions, NHTSA not only disagreed with petitioners' premise that booster seats secured with lap/shoulder belts would be safer than would booster seats secured with tethers, but also stated that:

> [t]he installation of Type 2 belts in the rear outboard seating positions would make the installation of the conventional child safety seat much less convenient than with the current Type I belt. This would occur because the shoulder portion of a Type 2 belt would have to be placed behind the restraint, or otherwise moved out of the way, since most child restraints are designed to be used only with lap belts. This is an important consideration in view of the fact that 44 States and the District of Columbia have laws requiring the use of child safety seats. These State use laws make it desirable that

> compliance be accomplished as smoothly as possible.

49 Fed. Reg. at 15241-15242.

Against this background, the agency's decision not to require lap/shoulder belts in the rear center position, but rather to continue to give manufacturers the *option* of providing lap belts or lap/shoulder belts in rear non-outboard seats (including the rear center seat), makes eminent sense and clearly reflects a deliberate policy decision. The decision fosters flexibility, incorporates an appropriate assessment of the excessive costs that a lap/shoulder belt requirement would have imposed, reflects well-founded concerns – including safety concerns – about the technological problems that would be created by a lap/shoulder requirement for rear non-outboard seats, and demonstrates a prudent approach to the knotty and continuing dilemma posed by the seat belt/child restraint compatibility problem.

NHTSA has also recognized that lap belts should be allowed in seating positions which are adjacent to an aisle (like Mrs. Williamson in the subject MPV) to assist with ingress and egress for passengers going to the far rear seat.

> NHTSA has long recognized that belts installed at seating positions located adjacent to an aisle can impede ready access to or egress from seats located behind them. That

> is why we originally allowed lap belts at these seating positions.

69 Fed. Reg. No. 235, p. 70909.

Any argument by Plaintiffs that a ban on Type 1 belts would not frustrate NHTSA's purposes under FMVSS 208, as it was in effect for the 1993 Mazda MPV, is unrealistic. The history of the regulation and its slow phase-in of Type 2 belts over the years shows how NHTSA carefully balanced safety and feasibility of belt systems while being mindful of the various applications to which Type 1 and Type 2 belts were put.

VI. CONCLUSION

As set forth in MC's moving papers, Plaintiffs' claims that Mrs. Williamson was injured as a result of the MPV not having a Type 2 belt in the rear center seat are preempted under FMVSS 208. The cases cited by MC overwhelmingly establish that when an automotive manufacturer has the choice of several specified options under a NHTSA standard, the choice of one of the specified options cannot give rise to a defect claim. Further, MC has established that NHTSA had a legitimate purpose behind allowing the Type 1 belt and, therefore, Plaintiffs' claims are barred.

DATED: June 28, 2006

BOWMAN AND BROOKE LLP

BY: /s/ [Illegible]
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[Proof Of Service And Service List
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, Inc., a California corporation; FORD MOTOR COMPANY, a Delaware corporation;	**CASE NO. 04CC06494** **Assigned:** **Hon. Michael Brenner** **Department: C20** **DEFENDANT MAZDA MOTOR CORPORATION'S OBJECTIONS TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE** [Filed concurrently with Reply to Opposition to Mazda Motor Corporation's Motion for Judgment on the Pleadings]

AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive, Defendants.	**VIA FAX** **Date: July 6, 2006** **Time: 1:30 p.m.** **Dept.: C20** Action Filed: 7/7/04 Trial Date: 8/07/06 Motion Cutoff: 7/23/06 Discovery Cutoff: 07/08/06

TO ALL PARTIES AND THEIR COUNSEL OF RECORD HEREIN:

Defendant Mazda Motor Corporation (hereinafter "MC") hereby objects to the purported "Plaintiff's [*sic*] Request for Judicial Notice" as follows:

MC objects to Plaintiffs' purported Request for Judicial Notice in that Plaintiffs seek the admission of items which are not subject to judicial notice and which are irrelevant to this matter.

Request for Judicial Notice	**Objections**
2. Estate of Than Williamson's Responses to Mazda Motor of America, Inc.'s Special Interrogatories;	2. Discovery responses are not appropriately relied upon in a motion or opposition to a motion for judgment on the pleadings. C.C.P. 438(d); Evidence Code Sections 451-453. Thus, it is irrelevant. (Ev. Code Section 350). These interrogatory responses are irrelevant,

	especially since they reflect matters not included in the Second Amended Complaint. To the extent that the Court admits these interrogatory responses, they may be looked at only as an admission by the Plaintiffs. For example, in response to Interrogatory No. 78, Plaintiffs note the heart of their Complaint: "A lap-shoulder belt would have prevented PLAINTIFFS ALEXA WILLIAMSON and THANH WILLIAMSON from 'jackknifing' over the lap belt and thus prevented severe abdominal injuries." The other complaints are supplemental to the lap-shoulder belt claim, in that Plaintiffs say that they "would have further reduced injury." Response to Interrogatory No. 78, p. 27.
3. National Transportation Safety Board's "Safety Recommendation to Foreign Manufacturers;"	3. This document is irrelevant. Evidence Code Section 350. The NTSB's letter/memorandum has nothing to do with the NHTSA options provided to manufacturers to select a lap-shoulder belt or a lap belt. Indeed, Plaintiffs simply

	throw it into their opposition, without tying it to any of NHTSA's actions. This letter from NHTSA is not judicially noticeable under Evidence Code Sections 451-453, and may not be considered by the Court. Moreover, the NTSB states itself, in the document, "this study is limited," and that "the small size of the sample in this study means that no statistically valid conclusions can be drawn from it." Exh. 3, p. 2.
4. NHTSA's Report entitled "Effectiveness of Lap/Shoulder Belts in the Back Outboard Seating Positions.	4. This document is irrelevant. Evidence Code Section 350. Further, this is not a document of which the Court can take judicial notice under Evidence Code Sections 451-453. The June 1999 report has no bearing on a vehicle manufactured in 1992 or 1993.

For all the foregoing reasons, Plaintiffs' Request for Judicial Notice of Items 2, 3, and 4 must be rejected as they are not matters of which the Court can take judicial notice. The only specific authority for judicial notice that Plaintiffs' cite, Evidence Code Section 452(d), refers to "Records of (1) any court of this state or (2) any court of record of the United

States or any state of the United States." Clearly interrogatory responses, an NTSB letter, and a NHTSA report are not records of the Court.

DATED: June 28, 2006

BOWMAN AND BROOKE LLP

By: /s/ [Illegible]
Brian Takahashi
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MAZDA MOTOR OF AMERICA, INC.
dba MAZDA NORTH AMERICAN
OPERATIONS

[Proof Of Service And Service List
Omitted In Printing]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

CENTRAL JUSTICE CENTER

DEPARTMENT C20

DELBERT WILLIAMSON, ET AL.,	)	
PLAINTIFFS,	)	
VS.	)	NO. 04CC06494
MAZDA MOTOR OF AMERICA, INC.,	)	
DEFENDANT.	)	

THE HONORABLE MICHAEL BRENNER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

THURSDAY, JULY 6, 2006

APPEARANCES OF COUNSEL:

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ATTORNEYS AT LAW
BY: SHAHRAM A. SHAYESTEH

FOR DEFENDANT: BOWMAN AND BROOKE
ATTORNEYS AT LAW
BY: JULIAN G. SENIOR
AND BRIAN TAKAHASHI

KIMBERLY REX, RMR, CSR #6638
OFFICIAL COURT REPORTER

[2] **SANTA ANA, CALIFORNIA – THURSDAY, JULY 6, 2006 AFTERNOON SESSION**

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT:)

THE COURT: ON WILLIAMSON VERSUS MAZDA MOTORS.

MR. SHAYESTEH: GOOD AFTERNOON, SHAHRAM SHAYESTEH FOR PLAINTIFFS.

MR. SENIOR: GOOD AFTERNOON AGAIN, YOUR HONOR. JULIAN G. SENIOR FOR DEFENDANTS MAZDA.

MR. TAKAHASHI: GOOD AFTERNOON, BRIAN TAKAHASHI WITH MR. SENIOR.

THE COURT: WELL, THIS IS A MOTION FOR JUDGMENT ON THE PLEADINGS. THE THEME OF IT, CORRECT ME IF I AM WRONG, IS THAT THIS PREEMPTION IN THAT I READ THIS ONE CASE, AND I HAVE TO TELL YOU THE FACTUAL PART OF IT IS INTERESTING. *GEIER*, G-E-I-E-R, 529 U.S. 861, 120, SUPREME COURT 1913. I THINK THAT IS A CITATION.

I STARTED TO SAY THE HISTORY OF SEAT BELTS AND ALL THAT IS INTERESTING. THE LEGAL ANALYSIS GETS TO BE PRETTY HARD GOING AFTER A WHILE.

BUT THE POINT IS, THAT, YOU KNOW, THERE IS THIS INVOLVED SCHEME THAT THE

FEDERAL DEPARTMENT OF TRANSPORTATION HAS INVOLVING THE PHASING IN OF PASSENGER RESTRAINTS. A STATE TORT CAUSE OF ACTION WOULD BE CONTRARY TO THAT SCHEME THAT YOU – WELL, IT WAS – WE ALL READ THAT [3] CASE.

THE POINT WAS THEY WERE PHASING VARIOUS ALTERNATIVES, AND ALL THAT. I GUESS THEY GOT BURNT WITH THE EMISSION LOCK AND PERHAPS THE – I REMEMBER MYSELF HAVING – MY WIFE HAD A MERCURY TOPAZ THAT HAD THAT SEAT BELT GOING UP THE DOOR WHEN YOU SHUT THE DOOR. WHAT A PAIN IN THE NECK THAT THING WAS.

APPARENTLY, AS I UNDERSTAND IT, SOME OF THOSE THINGS, THE WAY THEY HAD NO PUBLIC ACCEPTANCE. SO THERE WAS AN AVOIDANCE OF THEM.

SO THE DEPARTMENT OF TRANSPORTATION DEVELOPED A CALL IT A SCHEME, WHERE THEY WERE GOING TO PHASE IN VARIOUS ALTERNATIVES THAT WOULD ALLOW FOR SCIENTIFIC TESTING, YOU KNOW, COST SAVING AND GREATER ACCEPTANCE BY THE PUBLIC.

SO, IF – SO AS PART OF THAT AT THE TIME THIS MAZDA WAS MADE, THE ARGUMENT IS THAT THE FEDERAL STANDARD ALLOWED FOR THE LAP ONLY SEAT BELTS IN THE BACK SEAT. THEY HAD A STATE COURT TORT LAW IN

EFFECT DEMAND A HIGHER STANDARD. IT WOULDN'T BE SO HARMFUL OR CONTRARY TO THE FEDERAL SCHEME THAT IT WOULD BE PREEMPTED.

SO, THERE YOU HAVE IT, IS MY UNDERSTANDING. YOU'RE THE MOVING PARTY, COUNSEL.

MR. SENIOR: I THINK IN A NUTSHELL, YOUR HONOR, YOU GOT THE OUTLINE OF THE ARGUMENT. AS PLAINTIFF AGREES IN THIS VEHICLE, THE 1993 MAZDA MPV. FMVSS, FEDERAL MOTOR VEHICLE SAFETY STANDARD 208, IN THE REAR MIDDLE SEATS, [4] MIDDLE SEATS ONLY, REQUIRE MANUFACTURERS TO USE EITHER TYPE 1 SEAT BELT, WHICH IS THE LAP BELT ONLY THAT YOU DESCRIBED, OR TYPE 2 SEAT BELT, WHICH IS THE THREE-POINT OR LAP-AND-SHOULDER-BELT SEAT BELT SYSTEM.

THE SEAT THAT MRS. WILLIAMSON, DECEASED IN THIS CASE, WAS SITTING IN, WAS EXACTLY THAT, A REAR CENTER SEAT. AND IT WAS EQUIPPED WITH A TWO-POINT BELT SYSTEM ONLY.

SINCE APPROXIMATELY 1989, THREE-POINT BELT SYSTEMS HAVE BEEN REQUIRED IN THE OUTBOARD SEATING POSITIONS. BUT IN '89, WHEN THAT DECISION WAS MADE, AND THIS WAS SPECIFICALLY DECIDED THAT THEY WERE NOT GOING TO REQUIRE THREE-POINT SEAT

BELTS IN THESE REAR CENTER SEAT POSITION.

SO WHAT PLAINTIFFS HAVE ALLEGED IN THEIR SECOND AMENDED COMPLAINT, WAS THAT MRS. WILLIAMSON WAS INJURED BY VIRTUE OF USING THIS LAP-BELT-ONLY SYSTEM THAT WAS IN THIS REAR CENTER SEAT.

THE COURT: WELL, LET ME JUST INTERRUPT YOU FOR ONE SECOND.

TO THE EXTENT THAT THIS JUDGMENT ON THE PLEADINGS OUGHT TO BE VIEWED AS SOMEWHAT SIMILAR TO A DEMURRER, I THINK THEIR PLEADINGS ARE BROAD ENOUGH TO ALLEGE OTHER – THEY'RE BROADER THAN THAT.

I DON'T HAVE THE EXACT QUOTE HERE, BUT I THINK THEY WOULD ENCOMPASS THE IDEA THAT THERE WERE OTHER PROBLEMS WITH THE MAZDA, IS WHAT I AM TRYING TO SAY. IT'S [5] ABILITY TO SURVIVE CRASHES BEYOND THE SEAT BELT CAUSE OF ACTION.

YOU POINTED OUT THAT IT IS – THAT I COULD SEPARATE THAT OUT UNDER THE LAW, WE COULD GRANT THIS MOTION AS TO ONLY THE THEORY, I GUESS IT WOULD BE, THAT THE ACCIDENT IS CAUSED BY THE LAP-ONLY SEAT BELT, LEAVING THE OTHER CAUSE OF ACTION.

AND I NOTE THAT THE PLAINTIFF IS SUGGESTING THEY WOULD LIKE LEAVE TO AMEND

IF YOUR MOTION WAS GRANTED. I TAKE IT THAT WOULD BE JUST ELABORATE ON WHAT APPEARS TO BE THEIR OTHER THEORIES OF LIABILITY THAT IS IN DISPUTE.

YEAH, THAT IS WHAT PLAINTIFFS HAVE ASKED, THAT THEY BE GIVEN LEAVE TO AMEND.

NOW ALSO COMBINED WITH THE THIRD CAUSE OF ACTION IS COMPLETELY AND SIMPLY RELATED TO THE TWO-POINT BELTS, SO THE ENTIRE CAUSE OF ACTION WOULD GO OUT.

BUT YOU'RE ABSOLUTELY RIGHT. WHAT WE'RE ASKING HERE IS FOR YOU TO TAKE THOSE BELTS – THOSE TWO-POINT VERSUS THREE-POINT BELT CLAIMS OUT OF THE, CASE NOT THE OTHER CAUSES OF ACTION. BECAUSE THOSE CAUSES OF ACTION RELATE TO THE INJURIES THAT DEALT TO THE DRIVER AS WELL.

NOW, PLAINTIFFS HAVE INDICATED THEY – THAT THEY WOULD LIKE LEAVE TO AMEND. HERE WE ARE, I BELIEVE, TWO YEARS AFTER THE INITIAL COMPLAINT WAS FILED, ALMOST A YEAR AFTER THE SECOND AMENDED COMPLAINT WAS FILED. DISCOVERY IS CLOSED. WE HAVE A TRIAL DATE THAT YOUR HONOR [6] JUST MOVED YESTERDAY, ALREADY SET.

EVERY – I THINK ALMOST EVERY FACT WITNESS EXCEPT THREE OR FOUR HAS BEEN DEPOSED. AND HERE FOR THE FIRST TIME THEY'RE SEEKING LEAVE TO AMEND THE COMPLAINT ON THE EVE OF GETTING THIS CLAIM KICKED OUT.

SO WE THINK IT WOULD BE ERROR TO AMEND THE COMPLAINT AT THIS TIME.

BUT IF YOU WOULD LIKE ME TO GO ANY FURTHER ABOUT OUR ARGUMENT ABOUT THE PREEMPTION OF THE CLAIM, I CAN DO THAT AT THIS POINT.

THE COURT: LET'S HEAR FROM COUNSEL.

MR. SHAYESTEH: INITIALLY I WOULD JUST LIKE TO STATE FOR THE RECORD THAT THEIR MOTION IS PROCEDURALLY DEFECTIVE. THEY CAN'T SEVER OUT ONLY THE SEAT-BELT CLAIMS BECAUSE THEIR NOTICE DOESN'T ASK YOU TO DO THAT.

IT ASKS YOU TO DISMISS ALL CLAIMS ARISING OUT OF THE DEATH OF THE DECEDENT, AND AS YOU POINTED OUT, YOU CAN'T DO THAT BECAUSE THEY DON'T ADDRESS EVERY POSSIBLE THEORY.

THEN WE HAVE CODE OF CIVIL PROCEDURE 1010 CRC 311(A), AND CASE LAW *PEOPLE VERSUS AMERICAN SURETY INSURANCE COMPANY*, 75 CAL.APP.4TH 719, WHICH STATES THAT

THEY HAVE TO STATE THOSE GROUNDS IN THEIR NOTICED MOTION. THEY DON'T DO THAT. SO IT IS PROCEDURALLY DEFECTIVE. I DON'T BELIEVE THAT WE CAN SEVER OUT THOSE CLAIMS WITHOUT HAVING THEM RE-FILE THEIR MOTION AS STATED ACCURATELY IN [7] THEIR NOTICED MOTION.

IN ANY CASE, WE HAVE PUT THEM ON NOTICE OF THE ADDITIONAL THEORIES, SEAT BACK, SEAT GEOMETRY ISSUES A YEAR AGO IN DISCOVERY RESPONSES.

SO FOR THEM TO SAY THIS IS THE LAST MINUTE, THEY DIDN'T KNOW, IS JUST NOT – NOT REALISTIC. THEY WERE NOTIFIED OF THOSE CLAIMS, AND THIS IS A NOTICED PLEADING STATE, IT IS NO DIFFERENT THAN ALLEGING IN THE COMPLAINT AND THEY KNOW WHAT THE THEORIES WERE. THEIR EXPERTS HAVE LOOKED AT THOSE THEORIES. THEY HAD A CHANCE TO INSPECT THE VEHICLE.

SO THEY HAVEN'T BEEN PREJUDICED BECAUSE THOSE SPECIFIC THEORIES ARE NOT IN OUR COMPLAINT. THEY WERE NOTIFIED OF THOSE A YEAR AGO.

AND I HAVE ATTACHED THOSE DISCOVERY RESPONSES AS EXHIBIT 2 TO OUR REQUEST FOR JUDICIAL NOTICE.

AND, FINALLY, AS FAR AS OUR REQUEST TO AMEND THE COMPLAINT, I BELIEVE THAT IS SIMPLY A REQUEST TO CONFORM THE COMPLAINT TO THE EVIDENCE. IT WOULD NOT INCREASE THE SCOPE OF THE CASE.

AGAIN, THAT INFORMATION HAS BEEN OUT THERE, SO, IT IS JUST A MATTER OF CLEANING THINGS UP AT THIS POINT SO THAT WE CAN DEAL WITH THE PREEMPTION ISSUE IF WE HAVE TO.

THE COURT: ALL RIGHT. ANYTHING FURTHER?

MR. SENIOR: JUST TAKE A LITTLE BIT OF ISSUE WITH THAT. I THINK WHAT THEY'RE DOING IS A LITTLE BIT OF [8] PUTTING THE CART BEFORE THE HORSE.

THE COMPLAINT AS READ, INDICATES THAT MS. WILLIAMSON WAS INJURED AS A RESULT OF JACK-KNIFING OVER THE LAP BELT. THAT IS ALL IT SAYS ABOUT MS. WILLIAMSON'S INJURIES.

IT DOES ALLEGE OTHER DEFECTS IN THE VEHICLE, BUT THAT IS THE ONLY DEFECT AND IT SPECIFICALLY TIES TO – SORRY, MRS. WILLIAMSON'S INJURY.

SECOND OF ALL, THE FIRE INSURANCE VERSUS SUPERIOR COURT 2004 CASE THAT WE CITE, SPECIFICALLY SAYS THAT ON A MOTION FOR JUDGMENT ON THE PLEADINGS, YOU CAN

EXERCISE OUT CLAIMS, VARIOUS CLAIMS, SUCH AS CLAIMS BASED UPON THE DEFECTIVE BELT AND THOSE KIND OF THINGS.

AND, THIRDLY, AND THIS IS WHAT WE SET FORTH IN OUR OBJECTION TO THEIR REQUEST FOR JUDICIAL NOTICE, WE CAN'T LOOK AT THEIR DISCOVERY RESPONSES HERE. WE'RE HERE ON A MOTION FOR JUDGMENT ON THE PLEADINGS.

DISCOVERY RESPONSES, EVIDENTIARY MATTER, IT IS NOT AT ISSUE. WE CAN LOOK AT THE CASE LAW, COMPLAINT, AND THE ANSWER. BUT WE SHOULDN'T BE LOOKING AT DISCOVERY RESPONSES IN DECIDING A MOTION FOR JUDGMENT ON THE PLEADINGS.

MR. SHAYESTEH: I WOULD JUST REFER THE COURT TO PARAGRAPH 18 OF THE SECOND AMENDED COMPLAINT, WHICH STATES: "AS A PROXIMATE RESULT OF THIS COLLISION, THANH WILLIAMSON, WHO IS THE DECEDENT, SUFFERED FATAL ABDOMINAL INJURIES AND [9] INTERNAL BLEEDING," ET CETERA; THE LAST SENTENCE STATES, "THESE INJURIES WOULD NOT HAVE OCCURRED OR THEY WOULD NOT HAVE BEEN AS SEVERE HAD THE DEFENDANTS DESIGNED THE SUBJECT VEHICLE AND ITS COMPONENTS TO BE SAFER AND MORE CRASH WORTHY."

SO WE'RE TALKING ABOUT CRASH WORTHINESS AS TO THE DECEDENT. IT IS NOT

LIMITED TO THE SEAT-BELT CLAIM. AND AS YOUR HONOR HAS ALREADY POINTED OUT, YOU HAVE TO READ THE COMPLAINT AS A WHOLE AND NOT IN BITS AND PIECES.

THE COURT: ALL RIGHT. I WILL TELL YOU WHAT, I BELIEVE THAT I CAN SEPARATE OUT THE JACK-KNIFE, WE WILL CALL IT, ASPECT OF THE – OF LIABILITY. AND I THINK THAT – SO THAT IS WHAT I AM GOING TO DO.

THEN ADDRESSING THE PREEMPTION ARGUMENT HAVING TO DO WITH ANY INJURY THAT WOULD HAVE ARISEN BECAUSE THEY HAD LAP BELT ONLY SEATS AS OPPOSED TO THE LAP BELT AND SHOULDER SEATS, I BELIEVE THE MOVING PARTY IS CORRECT IN THAT REGARD.

IT APPEARS TO ME THAT FEDERAL LAW AND FEDERAL POLICY DEVELOPED IN ALL THESE ARGUMENTS ABOUT THE PLAN THE DEPARTMENT OF THE TRANSPORTATION HAD FOR PHASING IN PASSENGER RESTRAINTS, WOULD PRECLUDE A STATE COURT TORT ACTION THAT WOULD HAVE SUBSTANTIAL IMPACT ON THE FEDERAL SCHEME.

SO I AM GOING TO GRANT THE MOTION FOR JUDGMENT ON THE PLEADINGS TO THE EXTENT OF THAT THEORY OF LIABILITY [10] OF THE LAP ONLY SEAT BELT.

I AGREE WITH COUNSEL FOR THE PLAINTIFF THAT IN THE COMPLAINT, I THINK IT IS ADEQUATELY PLED TO – ADEQUATELY PLED AS TO THE DEATH OF THE DECEDENT, OTHER CAUSES ARE STILL IN THE COMPLAINT. MAYBE IT IS THE DESIGN OF THE ANGLE OF THE SEAT PART OF IT, THE BACK OF THE SEAT, I FORGET EXACTLY, BUT THERE ARE OTHER THEORIES HERE.

SO THOSE THEORIES OF LIABILITY AS TO – FOR THE DECEDENT'S DEATH WOULD SURVIVE, DOESN'T SURVIVE AS TO THE LAP-BELT CLAIM.

I THINK THAT IS ADEQUATELY PLED. BUT WHAT I AM GOING TO DO IS TO GRANT – THERE IS THIS ABOUT IT: IT SEEMS THIS CASE IS TWO-YEARS OLD, BUT MY IMPRESSION IS THAT THIS ISSUE CAME UP FAIRLY RECENTLY.

SO, FOR THAT REASON, I DO THINK THAT THE PLAINTIFF SHOULD HAVE AN OPPORTUNITY TO PUT ON THE PLAINTIFF'S BEST CASE, CONCEAL WITH WHAT THE LAW IS.

SO MY INCLINATION IS TO GRANT THEM LEAVE TO FILED A THIRD AMENDED COMPLAINT, WHICH I UNDERSTAND MAYBE DOESN'T ADD NEW THEORIES, IT IS JUST MORE OR LESS FLUSHING OUT THE IDEA THAT THERE WERE OTHER SIMULTANEOUSLY – SIMULTANEOUS CAUSES OR BASIS OF LIABILITY TO THE DECEDENT'S DEATH.

SO, I AM GOING TO ALLOW THE FILING OF A THIRD AMENDED COMPLAINT. THAT CAN BE DONE SHORTLY, I TAKE IT.

MR. SHAYESTEH: YEAH, WE COULD DO THAT IN 10 DAYS.

[11] **THE COURT:** 10 DAYS. WITHIN 10 DAYS.

NOW, I DON'T KNOW HOW THAT IS GOING TO AFFECT THE TRIAL DATE. I WILL JUST WAIT TO SEE WHAT HAPPENS IN THAT REGARD.

BUT MY FEELING IS IT REALLY SHOULDN'T. I DON'T THINK THERE IS ANYTHING NEW ADDED; BUT, I CAN'T ANSWER THAT.

MR. SHAYESTEH: THERE IS ONE ISSUE, YOUR HONOR, THAT WE ADDRESSED IN OUR OPPOSITION THAT WAS NOT ADDRESSED IN THE MOVING PARTIES PAPERS, AND THAT IS THE ISSUE THAT THE FAILURE TO WARN CLAIM AS TO DEFECT INCLUDING THE SEAT BELTS ARE NOT PREEMPTION. WE CITED AUTHORITY FOR THAT. THEY DIDN'T ADDRESS IN THEIR MOVING PAPERS, BUT THEY HAVE ESSENTIALLY CONCEDED THAT.

I JUST WANT TO CLARIFY THAT WHEN WE FILE OUR AMENDED COMPLAINT, WE'RE STILL GOING TO HAVE A FAILURE TO WARN CLAIM AS TO THE SEAT BELTS.

THE COURT: WELL, I AM NOT SURE HOW YOU – I MEAN, THAT SEEMS LIKE THAT IS RIGHT BACK TO THE SAME ISSUE. THAT THEY HAD A RIGHT, I GUESS AS A PRACTICAL MATTER THEY HAD A RIGHT TO PUT IN A LAP-ONLY BELT IN THE MIDDLE OF THE SEAT, THEN I AM NOT SURE THERE IS ANY DUTY TO WARN.

MR. SENIOR: WELL, CERTAINLY ALLOWING IN A FAILURE TO WARN CLAIM ON THE LAP-BELT ONLY SEATS, WHICH THE – AND NHTSA HAS SAID ARE REQUIRED ON ONE OF THE TWO REQUIRED SYSTEMS, IS ESSENTIALLY JUST BACK-DOORING IN THE SAME [12] ARGUMENT THAT ONE OF THEM IS DEFECTIVE.

THE COURT: YOU CAN HAVE A FAILURE TO WARN ON ANY ON THE MOST EXTENSIVE, EXTREME, UNREQUIRED FOR RESTRAINED OR SAFETY DEVICE. IF ONE MAZDA HAD IN IT SOMETHING OR OTHER, SOME KIND OF AN AIR BAG THAT WENT ALL THE WAY AROUND THE CAR OR SOMETHING, I CAN'T EVEN THINK OF WHAT IT WOULD BE, BUT THAT WOULD BE A BASIS OF A FAILURE TO WARN CAUSE OF ACTION IF YOU DIDN'T HAVE THAT PARTICULAR DEVICE IN THE CAR THAT YOU GOT AN ACCIDENT IN.

MR. SHAYESTEH: THAT IS NOT THE THEORY, YOUR HONOR. THE THEORY IS THEY FAILED TO WARN ABOUT THE DANGERS OF A

LAP-ONLY BELT. SO IT IS NOT THAT THEY'RE FAILING TO WARN THAT YOU COULD HAVE A THREE-POINT, YOU COULD HAVE THIS, THAT IS NOT WHAT WE'RE TALKING ABOUT. THAT IS –

THE COURT: JUST OUT OF CURIOSITY, DID ANY MAZDAS HAVE A THREE-POINT BELT IN THE MIDDLE SEAT?

MR. SENIOR: IN A REAR MIDDLE SEAT IN 1993, I DON'T BELIEVE SO.

THE COURT: I DON'T KNOW. SO YOUR THEORY IS THAT MAZDA WOULD HAVE TO SAY YOU BUY OUR CAR, IF YOU WANT, BUT WE HAVE TO TELL YOU, IT IS A DEATH TRAP IN THE MIDDLE SEAT.

MR. SENIOR: THE POINT IS THAT YOU CAN'T CLAIM YOU FAILED TO WARN OF SOMETHING THAT IS NOT IN AND OF ITSELF DEFECTIVE.

SO IF NHTSA HAS SAID THIS IS A SAFE FORM OF BELT, YOU CAN'T SAY, WELL, YOU FAILED TO WARN THAT THAT IS [13] NOT A SAFE FORM OF BELT.

MR. SHAYESTEH: WELL, YOUR HONOR, THAT IS NOT WHAT THE CASE LAW SAYS. UNDER THE *CARLIN* CASE, 13 CAL.4TH 1104, SUPREME COURT CASE, IT SAYS "FAILURE TO WARN CLAIM IS INDEPENDENT LEGAL THEORY, DOES NOT REQUIRE ANY SHOWING OF DESIGN DEFECT."

WHAT THEY'RE SAYING IS NOT THE LAW.

THE COURT: I HAVEN'T SPENT A LOT OF TIME ON THAT BECAUSE IT DIDN'T SEEM TO BE THE THRUST OF THE CASE.

BUT I THINK OFF THE TOP OF MY HEAD IF YOU FEEL STRONGLY ABOUT PUTTING IT IN THERE, WE WILL PROBABLY LIVE TO VISIT IT ANOTHER DAY.

IT SEEMS TO ME THE THEORY WOULD BE THE SAME, THE SAME PREEMPTION THEORY. THAT IS THE DEPARTMENT OF TRANSPORTATION HAS SET UP THIS PHASE-IN SCHEME THAT THEY HAD BASED ON THEIR PRIOR HISTORY OF TRYING TO COMPEL SOME KIND OF RESTRAINT. AND, SO, A FAILURE TO WARN CAUSE OF ACTION WOULD INTERFERE WITH THAT SCHEME.

IT SEEMS LIKE, TO THE SAME EXTENT THAT THE BASIC TORT CAUSE OF ACTION BASED ON THE THREE-POINT VERSUS THE ONE-POINT OR TWO-POINT, OBVIOUSLY, LAP BELT. IT SEEMS LIKE IT WOULD BE THE SAME ARGUMENT, IS WHAT I AM TRYING TO SAY.

MR. SENIOR: IN ESSENCE THE RESULT WOULD BE THE MARKET CONDITIONS WOULD FORCE ALL VEHICLE MANUFACTURERS TO DO IT.

[14] **THE COURT:** IT SEEMS LIKE WE WOULD BE BACK ADDRESSING THIS BASED ON THE SAME CONCEPT.

SO I THINK THAT WHAT DOES SURVIVE IS ANY OTHER NON-LAP BELT CAUSE THAT YOU CAN ALLEGE AND PROVE, DEALING WITH THE SEAT ANGLE, THE BUMPERS, OR ANYTHING ELSE.

I THINK IT IS JUST THAT LAP-BELT SITUATION THAT SEEMS TO ME THAT BRINGS –

MR. SHAYESTEH: WELL, YOUR HONOR, IF I COULD JUST ASK YOU TO PERHAPS LOOK AT THAT AGAIN. THERE IS ANOTHER CASE WHICH AGAIN SAYS EVEN THOUGH A PRODUCT IS FLAWLESSLY DESIGNED AND MANUFACTURED, IT MAY BE FOUND DEFECTIVE WITHIN GENERAL STRICT LIABILITY PRINCIPLES BECAUSE OF THE FAILURE TO PROVIDE AN ADEQUATE WARNING.

AND THIS IS ANOTHER CALIFORNIA CASE, *PERSONS VERSUS SALOMON NORTH AMERICA*, 217 CAL.APP.3D 168. AGAIN, THEY DON'T ADDRESS THIS ISSUE BECAUSE THEY KNOW THEY CAN'T. THEY HAVE CONCEDED THE ISSUE.

THE COURT: ALL RIGHT. IF YOU – LIKE I SAY, IF YOU'RE CONFIDENT OF THAT WHEN YOU FILE YOUR THIRD AMENDED

COMPLAINT, MAYBE YOU WILL PUT THAT IN THERE.

MR. SHAYESTEH: OKAY.

MR. SENIOR: YOUR HONOR, I THINK I HAVE A PROPOSED ORDER WHICH APART FROM THE THIRD AMENDED COMPLAINT ADDRESSES YOUR RULING. WOULD YOU LIKE TO TAKE A LOOK AT THIS, OR SHALL WE SUBMIT ONE AT A LATER DATE?

THE COURT: WHY DON'T YOU SUBMIT ONE AT A LATER [15] DATE, SEND A COPY OVER TO COUNSEL, HOLD IT A COUPLE DAYS FOR HIM TO TAKE A LOOK AT IT, IF THERE IS NO OBJECTION, I WILL SIGN IT.

MR. SENIOR: WE WILL DO THAT.

THE COURT: PERUSE IT. THANKS VERY MUCH.

MR. SHAYESTEH: THANK YOU.

MR. SENIOR: THANK YOU.

THE CLERK: NOTICE ANYBODY?

MR. SENIOR: NOTICE WAIVED.

THE COURT: NOTICE WAIVED?

MR. SHAYESTEH: NOTICE WAIVED.

MR. TAKAHASHI: WE ARE GOING TO BE SUBMITTING AN ORDER ANYWAY.

THE COURT: OKAY.

(END OF PROCEEDINGS)

* * *

[Reporter's Certificate Omitted In Printing]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
MINUTE ORDER
06-JUL-2006

Dept: C20 CENTRAL JUSTICE CENTER

Convened at: 1:30:00

Judge/Comm: MICHAEL BRENNER

Bailiff: JOE BETANCOURT

Clerk: KA PO CHUNG-MARQUEZ

Reporter: KIMBERLY REX CSR #6638

Court Type: CIVIL

Court Category: WD – OTHER

Case Number: 04CC06494

Case Title: WILLIAMSON VS MAZDA MOTOR OF AMERICA INC

Doct Seq No: 74

Event: 660 MOTION FOR JUDGMENT ON THE PLE

Filing Party: MAZDA MOTOR CORPORATION

Appearances:

PLAINTIFF ATTORNEY GIRARDI & KEESE – Shahram A. Shayesteh

DEFENDANT ATTORNEY BOWMAN AND BROOKE, LLP – Julian G. Senior and Brian Takahashi for defendant Mazda Motor Corp.

Argument heard. Motion for Judgment on the Pleadings is granted. Court will allow Plaintiff to file within 10 days a Third Amended Complaint. Moving Party to submit a Proposed Order for the Court's signature. **ENTERED: 07-06-06 4**

Converted to PDF: 06-JUL-2006 at 5:54:16 PM

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Attorney for Plaintiffs

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF ORANGE

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson,

Plaintiffs,

vs.

MAZDA MOTOR OF AMERICA, INC., a California corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive,

Defendants.

CASE NO.04CC06494

Hon. Michael Brenner
(Dept, C~~21~~20)

THIRD AMENDED COMPLAINT

1. Strict Products Liability
2. Negligence
3. Intentional Misrepresentation and Concealment
4. Wrongful Death

DEMAND FOR JURY

(Filed Jul 18, 2006)

Plaintiffs DELBERT WILLIAMSON, ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson, and ESTATE OF THANH WILLIAMSON hereby allege as follows:

SUMMARY

1. On or about August 14, 2002, Plaintiffs Delbert Williamson, Alexa Williamson, and the decedent Thanh Williamson, represented through her Estate ("PLAINTIFFS"), were injured while they were traveling in their 1993 Mazda MPV Minivan when it was struck head-on by a 1998 Jeep Wrangler that had crossed the center divider line of a highway, after having become detached from a motor home being driven by Jack W. Bonzelaar.

2. All passengers in the Williamsons' 1993 Mazda MPV Minivan wore seat belts. Thanh Williamson, however, was killed when the forces generated by this collision and the defective and uncrashworthy design of the MPV caused her body to "jackknife" around her defective lap belt, causing severe abdominal injuries and internal bleeding. Her husband and daughter, Delbert and Alexa Williamson, were also injured in the accident due to the defective and uncrashworthy design of the MPV.

PARTIES

3. Plaintiff DELBERT WILLIAMSON is an individual who resides in the State of Utah and is the deceased Thanh Williamson's husband.

4. Plaintiff ALEXA WILLIAMSON is an individual who resides in the State of Utah and is Delbert Williamson and the deceased Thanh Williamson's daughter.

5. Plaintiff ESTATE OF THANH WILLIAMSON is the probate estate of the deceased Thanh Williamson and is represented by her Survivors, Delbert Williamson and Alexa Williamson.

6. Defendant MAZDA MOTOR CORPORATION ("MAZDA") is a Japanese corporation, with its principle place of business in Hiroshima, Japan.

7. Defendant MAZDA MOTOR OF AMERICA, INC. ("MAZDA AMERICA") is a California corporation, with its principle place of business in Irvine, California.

8. The true names and/or capacities, whether individual, corporate, associate or otherwise, of Defendants DOES 1 through 100, inclusive, are unknown to PLAINTIFFS, who therefore sue said DEFENDANTS by such fictitious names. PLAINTIFFS are informed and believe, and upon such information and belief allege, that each of the DEFENDANTS fictitiously named herein as a DOE is legally responsible, negligently or in some other actionable manner, for the events and happenings hereinafter

referred to, and proximately caused the injuries and damages to PLAINTIFFS hereinafter alleged. PLAINTIFFS will seek leave of Court to Amend this Complaint to assert the true names and/or capacities of such fictitiously named DEFENDANTS when the same have been ascertained.

9. PLAINTIFFS are informed and believe, and thereupon allege, that at all times mentioned herein, DEFENDANTS, including DOES 1 through 100, were the agents, servants, employees and/or joint venturers of their co-DEFENDANTS, and were, as such, acting within the course, scope and authority of said agency, employment and/or joint venture, and that each and every DEFENDANT, as aforesaid, when acting as a principal, was negligent in the selection and hiring of each and every DEFENDANT as an agent, employee and/or joint venturer.

10. Defendants MAZDA, MAZDA AMERICA, and DOES 1 through 100 are at all times herein mentioned were engaged in the business of selling, manufacturing, designing, testing, engineering, marketing, modifying, assembling, inspecting, distributing, and controlling Mazda MPV Minivans and other similar automobiles. MAZDA, MAZDA AMERICA, and DOES 1 through 100 market, distribute, sell, modify and repair their vehicles, including the 1993 Mazda MPV Minivan, within the County of Orange, State of California.

11. MAZDA, MAZDA AMERICA, and DOES 1 through 100 knew, expected and intended the 1993

Mazda MPV and other similar automobiles and/or substantially similar automobiles to be used for the purposes of transporting persons and property.

12. MAZDA, MAZDA AMERICA, and DOES 1 through 100 at all times herein mentioned knew, expected and intended that the 1993 Mazda MPV Minivan and other similar automobiles and/or substantially similar automobiles and their component parts would be purchased and used by the purchaser or user without inspection for defects or dangerous propensities or properties therein or in any of its component parts.

13. MAZDA, MAZDA AMERICA, and DOES 1 through 100 knew, expected and intended that the 1993 Mazda MPV Minivan and other similar automobiles, including its component parts, were highly dangerous and equipped with hazardous instrumentalities to persons riding in them and/or in close proximity to them should such automobile, particularly its restraint systems, or any associated parts or components and/or the design, materials, workmanship, configuration, or location thereof be in any manner defective or fail use.

THE ACCIDENT

14. On August 14, 2002, Delbert Williamson, Thanh Williamson, and their daughter, Alexa Williamson, were traveling in their 1993 Mazda MPV Minivan ("SUBJECT VEHICLE"), heading north on Route 89 in Kane County, Utah. Delbert was driving

the SUBJECT VEHICLE, Thanh was sitting in the middle seat of the middle row of seats, and Alexa was sitting just behind Delbert in the middle row, next to her mother. Plaintiffs were all wearing their seatbelts, but whereas Delbert and Alexa were wearing three-point seatbelts, Thanh was only wearing a two-point seatbelt or lap belt.

15. Meanwhile, Jack W. Bonzelaar was driving a motor home, heading south on Route 89, towing a 1998 Jeep Wrangler using a "Blue Ox" tow bar. Suddenly, the Jeep Wrangler became detached from Bonzelaar's motor home and crossed the center divider line of Route 89, striking the SUBJECT VEHICLE being driven by Delbert Williamson.

16. As a proximate result of this collision, Thanh Williamson suffered fatal abdominal injuries and internal bleeding, Delbert Williamson suffered fractures to the right wrist, ankle and foot, and Alexa Williamson suffered abdominal contusions and mesenteric hematoma, requiring surgical intervention. These injuries would not have occurred or they would not have been as severe had MAZDA, MAZDA AMERICA, and DOES 1 through 100 designed the SUBJECT VEHICLE and its components to be safer and more crashworthy.

FEDERAL MOTOR VEHICLE SAFETY STANDARD 208

17. In 1996, Congress passed the National Traffic and Motor Vehicle Safety Act of 1996, 15

U.S.C. §§ 1381-1431 (the "Safety Act"), "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. To achieve that goal, Congress empowered the federal Department of Transportation to issue minimum safety standards for motor vehicle performance. See 15 U.S.C. §§ 1391(2), 1392(a). The Department, in turn, delegated this duty to the National Highway Transportation Safety Administration ("NHTSA"). See 49 C.F.R. § 501.2. NHTSA fulfilled its responsibility by promulgating the Federal Motor Vehicle Safety Standards ("FMVSS") published at 49 C.F.R. §§ 571.1-.302. The FMVSS are *minimum* standards that a vehicle must meet in order to be sold in the United States.

18. Most of the FMVSS are "performance" standards, which set forth how a vehicle must perform under certain circumstances. The most recognizable example of a performance standard is the crash testing section of FMVSS 208, which specifies the maximum injury criteria levels for crash test dummies in particular types of barrier impacts. The FMVSS also contain "design" standards, which dictate the parameters of how certain components are actually designed or placed in the vehicle. One example of a design standard is FMVSS 210, which dictates certain zones in which seat belt anchors must be installed.

19. The Safety Act also includes a "savings" clause that provides that "[c]ompliance with any Federal motor vehicle safety standard issued under

this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). In *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861, the U.S. Supreme Court construed this clause as evidencing Congress' intent to "preserve" common law tort claims "that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." *Id.* at 870.

20. At the time the SUBJECT VEHICLE was manufactured, Federal Motor Vehicle Safety Standard ("FMVSS") 208 permitted auto manufacturers to install either two-point lap belts (a "Type 1" system) or three-point lap/shoulder belts (a "Type 2" system) in the rear-center seats of their cars. See 49 C.F.R. § 571.208 S.4.1.4.2. (1990).

21. The relevant version of FMVSS 208 first took effect in 1968, when NHTSA passed its initial set of motor vehicle safety standards. See 32 Fed. Reg. 2408 (February 3, 1967). At that time, FMVSS 208 required the installation of lap/shoulder belts at the drivers' and right-front passengers' seating positions, and either lap belts or lap/shoulder belts at every other designated seating position (i.e. the center front seat and all rear seats). *Id.* at 2415. In the preamble accompanying the final rule, NHTSA characterized this rule as a "minimum safety standard" within the meaning of the Safety Act. 32 Fed. Reg. at 2408. The regulatory preamble contained no further explanation or statement of policy with respect to the agency's decision to give car makers the option of installing

either lap belts or lap/shoulder belts in rear seating positions. *See id.*

22. In 1986, the National Transportation Safety Board ("NTSB") issued a Safety Recommendation with respect to lap/shoulder belts. Among other things, the NTSB concluded that "[l]ap/shoulder belts provide superior crash protection to that of lap belts alone, and present a significantly lesser risk of induced injury. . . ." The NTSB further observed that "such systems appear to work effectively even for children, and they can be used with child safety seats and booster seats." The NTSB ultimately recommended that, "[g]iven the known deficiencies of lap-only belt systems and the superior crash protection offered by belt systems that incorporate an upper torso restraint, the Safety Board believes that government and industry should take a number of steps to reduce reliance on lap belts and increase the availability of lap/shoulder belt systems." With respect to the industry, the NTSB recommended that "early action . . . be taken to provide aftermarket retrofit assemblies to convert lap/only belts to lap/shoulder belts." The NTSB further found that such "retrofit assemblies" may be technically feasible "at very [sic] seating location," including rear-center seats. With respect to new cars, the NTSB recommended that all rear seats – including rear center seats – be equipped with lap-shoulder belts.

23. In 1988, NHTSA proposed to amend FMVSS 208 to require lap/shoulder belts in all rear outboard seating positions of passenger cars. See 53 Fed. Reg.

47982 (November 29, 1988). In its Notice of Proposed Rulemaking, NHTSA stated that it had decided not to propose a rear-center seat requirement based on manufacturers' complaints that the costs of installing lap/shoulder belts in rear-center seats might exceed the anticipated safety benefits. See *id.* at 47984. At no point did NHTSA state that lap/shoulder belts would be unsafe in rear-center seats, or that it affirmatively sought to give car makers the unfettered choice between installing lap belts or lap/shoulder belts in that seating position. To the contrary, it emphasized that "[r]ear seat lap/shoulder belts are estimated to be more effective than rear seat lap belts in reducing fatalities and moderate-to-severe injuries." *Id.* at 47982.

24. In 1989, NHTSA published a final rule requiring lap/shoulder belts in all rear-outboard seats, but retaining the regulatory option with respect to rear-center seats. See 54 Fed. Reg. 25275 (June 14, 1989). The regulatory preamble once again emphasized that "NHTSA believes that lap/shoulder belts would be more effective than lap-only belts in rear seating positions." *Id.*

25. In June 1999, NHTSA published a study on the relative safety advantages of lap belts and lap/shoulder belts in the rear seats of cars. Among other things, the study compared the fatality risk for lap/shoulder belted occupants to the risk for lap-belted occupants. NHTSA's principal conclusion was that "[t]he change from lap to lap/shoulder belts [in rear outboard seats] *has significantly enhanced occupant*

protection, especially in frontal crashes." NHTSA added that:

> In all crashes, lap/shoulder belts are 15 percent more effective than lap belts alone. In frontal crashes, lap/shoulder belts are 25 percent more effective than lap belts alone. . . . Lap/shoulder belts reduce the risk of both head and abdominal injuries in potentially fatal front crashes relative to lap belts only: head injuries by 47 percent and abdominal injuries by 52 percent.

26. In December 2002, President Bush signed into law a bill known as "Anton's Law," which provides for the improvement of child safety devices when installed in motor vehicles. See Pub. Law No. 107-318. One of the provisions of Anton's Law concerns the installation of lap/shoulder belts in rear-center seating positions. Specifically, Section 5(a) of the law directs NHTSA to amend FMVSS 208 to require lap/shoulder belts in rear-center seats by no later than December 2004.

27. Compelled by this statutory directive, on August 2003, NHTSA published a proposal to require lap/shoulder belts in all rear-center seats. 68 Fed. Reg. 46546 (August 2, 2003). At the time, NHTSA stated that Anton's Law is "fully consistent with the agency's preexisting plan to initiate rulemaking" to require lap/shoulder belts in rear-center seats. *Id.* at 46547. In its notice of proposed rulemaking, NHTSA once again emphasized the special safety benefits of lap/shoulder belts for children, stating that "one of

the primary reasons for today's proposal is the increased protection that children between the ages of four and eight gain by having a lap/shoulder belt made available in rear center seating positions. When these lap/shoulder belts are installed in the rear center seating position, there will be an additional, and potentially safer, seating position available for a child in a belt-positioning booster seats." *Id.* at 46548. NHTSA further emphasized that requiring lap/shoulder belts in rear-center seats would not just benefit children: [i]t would also benefit older occupants." *Id.*

THE DEFECTIVE MAZDA MPV

28. MAZDA, MAZDA AMERICA, and DOES 1 through 100, designed, tested, manufactured, assembled, distributed, marketed, and sold the SUBJECT VEHICLE.

29. At the time of its manufacture and retail sale by MAZDA, MAZDA AMERICA, and DOES 1 through 100, the SUBJECT VEHICLE was defective, uncrashworthy, and unsafe for its intended purposes and uses in that, among other respects:

a. The center seating position of the middle bench seat was equipped with an inferior and unsafe lap-only belt that did not provide adequate protection in frontal collisions because it did not restrain the upper torso of decedent Thanh Williamson, it did not prevent the body of decedent Thanh Williamson

from "jackknifing" around the lap-only belt, and it was anchored at an unsafe angle to the SUBJECT VEHICLE;

b. The angle, geometry, and composition of the seat bottom of the center and driver's side seating positions of the middle bench seat were inferior and unsafe in that they were unreasonably susceptible to ramping and submarining of passengers seated in those positions in frontal collisions;

c. The seat backs of the center and driver's side seating positions of the middle bench seat were inferior and unsafe in that they did not sufficiently withstand foreseeable forces in a frontal collision and folded forward causing Thanh and Alexa's upper torsos to further lean forward;

d. The entire vehicle did not contain sufficient energy-absorbing materials and structures to absorb reasonable amounts of force from a frontal collision, such that it was not reasonably crashworthy;

e. The front driver's side seating area lacked sufficient survival space, such that in a frontal collision, the driver's seat is dangerously compromised.

30. MAZDA, MAZDA AMERICA, and DOES 1 through 100, breached their duty of care to PLAINTIFFS by failing to use reasonable care in the

manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the SUBJECT VEHICLE, as follows:

a. MAZDA, MAZDA AMERICA, and DOES 1 through 100 had knowledge, prior to the sale of the SUBJECT VEHICLE to PLAINTIFFS, of the defects alleged in paragraph 29 above, but failed to adequately warn and instruct PLAINTIFFS and other consumers about the hazards, risks, and dangers of such defects;

b. MAZDA, MAZDA AMERICA, and DOES 1 through 100 failed to adequately evaluate and test the performance and crashworthiness of the SUBJECT VEHICLE, particularly with respect to the defects alleged in paragraph 29 above;

c. MAZDA, MAZDA AMERICA, and DOES 1 through 100 failed to make necessary modifications to the design of the SUBJECT VEHICLE after receiving notice of the defects alleged in paragraph 29 above;

d. MAZDA, MAZDA AMERICA, and DOES 1 through 100 included false and misleading information in advertising that misrepresented the safety features of the vehicle associated with the parts discussed in paragraph 29 above and failed to adequately apprise prospective purchasers of the latent defects associated

with the parts discussed in paragraph 29 above; and

e. MAZDA, MAZDA AMERICA, and DOES 1 through 100 failed to recall and repair the defects alleged in paragraph 29 above.

31. The defects and failures alleged in paragraphs 29 and 30 above were joint and concurrent causes of Plaintiff's injuries, such that each defect and failure cannot be evaluated and adjudicated separately but must be evaluated and adjudicated together. For example, the injuries to Thanh Williamson were the result of all of the defects alleged in paragraph 29, subsections (a)-(d), each defect acting in tandem to cause her severe abdominal injuries. But for the presence of all of these defects, Thanh Williamson's injuries would not have been as severe nor would she have died from her injuries.

32. MAZDA, MAZDA AMERICA, and DOES 1 through 100 have known for decades about the dangers associated with lap-only seatbelts in frontal collisions. Despite this knowledge and the fact that frontal collisions account for over 60% of all collisions, MAZDA, MAZDA AMERICA, and DOES 1 through 100 have engaged in despicable conduct in willful and conscious disregard of the safety of consumers by marketing and selling the SUBJECT VEHICLE as safe, when it was not, and failing to disclose to consumers the dangers associated with lap-only seatbelts in frontal collisions.

33. MAZDA, MAZDA AMERICA, and DOES 1 through 100, have conducted testing of lap-only seatbelts in comparison to three-point seatbelts. Those tests revealed that three-point seatbelts are far more effective in reducing abdominal, spinal, and other severe injuries in frontal collisions when compared to lap-only seatbelts. Despite this knowledge, MAZDA, MAZDA AMERICA, and DOES 1 through 100 engaged in despicable conduct in willful and conscious disregard of the safety of consumers by choosing to utilize a lap-only seatbelt for the center seating position of the middle bench seat in the SUBJECT VEHICLE instead of a three-point seatbelt, even though three-point seatbelts were technically feasible at the time of the design and manufacture of the SUBJECT VEHICLE. Equipping the SUBJECT VEHICLE with a three-point seatbelt in that seat would have cost MAZDA, MAZDA AMERICA, and DOES 1 through 100 less than $50 per vehicle.

34. Various government-sponsored automotive safety institutes, including NHTSA, have given the SUBJECT VEHICLE the lowest possible rating in crash tests, due in large part to its poor crashworthiness and defective lap-only seat belt.

35. Despite the overwhelming evidence of the risks associated with lap belt only systems from *almost 40 years ago* to the present, MAZDA, MAZDA AMERICA, and DOES 1 through 100 have repeatedly lobbied ("NHTSA") to forego its suggested implementation of a new FMVSS which would have

required three-point belts at all seating locations in motor vehicles sold to the public.

36. Despite empirical medical/scientific evidence and urgings by NHTSA and the NTSB, MAZDA, MAZDA AMERICA, and DOES 1 through 100 continued to manufacture the SUBJECT VEHICLE with lap-only belts. On August 8, 1986, the NTSB issued a safety recommendation to auto manufacturers. In this safety recommendation, the chairman of the NTSB noted that its own investigation concluded that *the crash performance of lap-only belts was "very poor."* The NTSB went on to state: "Furthermore, *the Safety Board believes that it may be technically feasible to provide 3 -point, lap/shoulder belts at every seating location*; if so, such systems should be required as soon as possible. As long ago as the 1970s, the NHTSA proposed such a requirement, at least for passenger cars." The NTSB also stated: "It may be argued that the center front and center rear seating locations in passenger cars have the lowest rates of occupancy, and that therefore it is not warranted to provide the superior protection of lap/shoulder belts at these locations. *The Safety Board believes that, to the extent these seating positions are used, their occupants deserve crash protection equal to those provided for other occupants."*

37. As a proximate result of the hereinabove and hereinafter alleged acts, omissions, and conduct of MAZDA, MAZDA AMERICA, AND DOES 1 through 100, PLAINTIFFS have been injured: sustaining temporary and permanent injuries to their

body and nervous system, and severe mental and emotional pain and suffering, by virtue of their own injuries and by having witnessed the suffering and death of Thanh Williamson (Dillon v. Legg (1968) 68 Cal.2d 728), while also being physically injured and in the "zone of danger" (Utah law of compensatory damages for emotional distress as set forth by Utah Supreme Court in *Johnson v. Rogers* 763 P2d 711, 735 (1988) and *Hansen v. Sea Ray Boats,* 830 P2d 236, 238-239 (1992)), all to their general damage in an amount in excess of the minimum jurisdictional limits of the above-entitled Court and to be determined at trial.

38. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, MAZDA AMERICA, and DOES 1 through 100, PLAINTIFFS have incurred and will in the future incur medical expenses for, among other things, physicians, surgeons, medical and nursing attendants, hospital bills, x-rays and other medical care, in a sum to be determined at trial.

39. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, MAZDA AMERICA, and DOES 1 through 100, Plaintiff Delbert Williamson has suffered loss of wages and a loss of earning capacity, in a sum to be determined at trial.

40. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, MAZDA AMERICA, and DOES 1 through

100, Delbert Williamson has incurred funeral and burial expenses for Thanh Williamson, in a sum to be determined at trial.

41. As a proximate result of the death of Thanh Williamson, which occurred only after she suffered several hours of severe pain and suffering, Delbert Williamson, her husband, and Alexa Williamson, her daughter, have suffered and will continue to suffer from the loss of Thanh Williamson's love, affection, support, counsel, comfort, and society, all to their general damage in a sum to be determined at trial.

42. As a proximate result of the hereinabove alleged acts, omissions and conduct of MAZDA, MAZDA AMERICA, and DOES 1 through 100, PLAINTIFFS have incurred various and sundry losses and expenses, in a sum to be determined at trial.

FIRST CAUSE OF ACTION FOR STRICT PRODUCTS LIABILITY

(BY PLAINTIFFS, ON THEIR OWN BEHALF AND AS SURVIVORS OF THANH WILLIAMSON, AGAINST MAZDA, MAZDA AMERICA, AND DOES 1 through 100)

43. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

44. MAZDA, MAZDA AMERICA, and DOES 1 through 100 manufactured, designed, tested, marketed, sold, and were responsible for warning of any risks or dangers of the SUBJECT VEHICLE and its component parts. MAZDA, MAZDA AMERICA, and DOES 1 through 100 knew, or should have known, that the SUBJECT VEHICLE and its component parts would be purchased and used by consumers without inspection for defects or hazards.

45. At the time of its manufacture and retail sale by MAZDA, MAZDA AMERICA, and DOES 1 through 100 the SUBJECT VEHICLE was defective, uncrashworthy, and unsafe as described in paragraphs 29 and 30 above, and MAZDA, MAZDA AMERICA, and DOES 1 through 100 failed to warn PLAINTIFFS and other consumers about said defects.

46. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, MAZDA AMERICA, AND DOES 1 through 100, PLAINTIFFS have suffered damages as alleged above.

47. As alleged above, the conduct of MAZDA, MAZDA AMERICA, and DOES 1 through 100 constitutes malice, oppression, and fraud under Civil Code § 3294. Therefore, PLAINTIFFS are entitled to an award of punitive damages.

SECOND CAUSE OF ACTION FOR NEGLIGENCE

(BY PLAINTIFFS, ON THEIR OWN BEHALF AND AS SURVIVORS, AGAINST MAZDA, MAZDA AMERICA, AND DOES 1 through 100)

48. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

49. MAZDA, MAZDA AMERICA, and DOES 1 through 100 owed a duty of care to the PLAINTIFFS in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the SUBJECT VEHICLE as described in paragraphs 29 and 30 above.

50. MAZDA, MAZDA AMERICA, and DOES 1 through 100 breached their duty of care to PLAINTIFFS by failing to use reasonable care in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the SUBJECT VEHICLE as described in paragraphs 29 and 30 above.

51. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, MAZDA AMERICA, AND DOES 1 through 100, PLAINTIFFS have suffered damages as alleged above.

THIRD CAUSE OF ACTION

FOR INTENTIONAL MISREPRESENTATION AND CONCEALMENT (BY PLAINTIFFS, ON THEIR OWN BEHALF AND AS SURVIVORS, AGAINST MAZDA, MAZDA AMERICA, and DOES 1 through 100)

52. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

53. MAZDA, MAZDA AMERICA, and DOES 1 through 100 knew that the SUBJECT VEHICLE was defective as alleged in paragraphs 29 and 30 above because their own research demonstrated these presence and likelihood of these defects. Despite these known dangers to PLAINTIFFS and other consumers, MAZDA, MAZDA AMERICA, and DOES 1 through 100 marketed and advertised that the SUBJECT VEHICLE as safe and free from defects. These representations were materially false.

54. MAZDA, MAZDA AMERICA, and DOES 1 through 100 intentionally suppressed material facts about the known dangerous propensities of the defects alleged in paragraphs 29 and 30 above. MAZDA, MAZDA AMERICA, and DOES 1 through 100 were under a duty to disclose to PLAINTIFFS and other consumers all known material facts regarding the defects alleged in paragraphs 29 and 30 above.

55. MAZDA, MAZDA AMERICA, and DOES 1 through 100 intentionally concealed and suppressed the known material facts regarding the defects alleged in paragraphs 29 and 30 above with the intent to defraud and induce PLAINTIFFS and other consumers to purchase and use the SUBJECT VEHICLE.

56. PLAINTIFFS, as purchasers and users of the SUBJECT VEHICLE, reasonably and justifiably relied on MAZDA, MAZDA AMERICA, and DOES 1 through 100's misrepresentations and nondisclosures regarding the defects alleged in paragraphs 29 and 30 above. Because of MAZDA, MAZDA AMERICA, and DOES 1 through 100's material misrepresentations and nondisclosures, PLAINTIFFS lacked complete information regarding the defects alleged in paragraphs 29 and 30 above, and the likelihood of grave injury and/or death to passengers in the event of a frontal collision.

57. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, MAZDA AMERICA, and DOES 1 through 100, PLAINTIFFS have suffered damages as alleged above.

58. As alleged above, the conduct of MAZDA, MAZDA AMERICA, and DOES 1 through 100 constitutes malice, oppression, and fraud under Civil Code § 3294. Therefore, PLAINTIFFS are entitled to an award of punitive damages.

FOURTH CAUSE OF ACTION FOR WRONGFUL DEATH

(BY PLAINTIFFS DELBERT WILLIAMSON AND ALEXA WILLIAMSON AGAINST MAZDA, MAZDA AMERICA, AND DOES 1 through 100)

59. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

60. As a proximate result of the death of Thanh Williamson, Delbert Williamson, her husband, and Alexa Williamson, her daughter, have suffered and will continue to suffer from the loss of Thanh Williamson's love, affection, support, counsel, comfort, and society, all to their general damage in a sum in excess of the minimum jurisdiction of the above-entitled court.

61. As a proximate result of the death of Thanh Williamson, Delbert Williamson has incurred funeral and burial expenses for Thanh Williamson, in a sum to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, PLAINTIFFS pray for judgment against MAZDA, MAZDA AMERICA, AND DOES 1 through 100 as follows:

FIRST CAUSE OF ACTION

1. For compensatory and general damages according to proof;

2. For special and incidental damages according to proof;

3. For costs of suits incurred herein;

4. For pre-judgment interest according to law and proof;

5. For punitive damages;

6. For such other and further relief as the court deems just and proper.

SECOND CAUSE OF ACTION

1. For compensatory and general damages according to proof;

2. For special and incidental damages according to proof;

3. For costs of suits incurred herein;

4. For pre-judgment interest according to law and proof;

5. For such other and further relief as the court deems just and proper.

THIRD CAUSE OF ACTION

1. For compensatory and general damages according to proof;

2. For special and incidental damages according to proof;

3. For costs of suits incurred herein;

4. For pre-judgment interest according to law and proof;

5. For punitive damages;

6. For such other and further relief as the court deems just and proper.

FOURTH CAUSE OF ACTION

1. For compensatory and general damages according to proof;

2. For special and incidental damages according to proof;

3. For costs of suits incurred herein;

4. For pre-judgment interest according to law and proof;

5. For such other and further relief as the court deems just and proper.

JURY DEMAND

PLAINTIFFS hereby demand a trial by jury on all claims so triable.

DATED: July 17, 2006

GIRARDI | KEESE

/s/ [Illegible]
DAVID R. LIRA
Attorneys for PLAINTIFFS

[Proof Of Service Omitted In Printing.]

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Attorneys for Defendant
MAZDA MOTOR CORPORATION and
MAZDA MOTOR OF AMERICA, INC. d/b/a
MAZDA NORTH AMERICAN OPERATIONS, INC.

**SUPERIOR COURT OF
THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF ORANGE –
CENTRAL JUSTICE CENTER**

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williams [sic] and Alexa Williamson, Plaintiffs vs. MAZDA MOTOR OF AMERICA, Inc.,	**CASE NO. 04CC06494** **Assigned: Hon. Michael Brenner** **Department: C20** **[PROPOSED] ORDER GRANTING: MAZDA MOTOR CORPORATION'S MOTION FOR JUDGMENT ON THE PLEADINGS** (Filed Aug. 11, 2006)

a California corporation; FORD MOTOR COMPANY, a Delaware corporation; AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive, Defendants.	**[CCP 438 and common law]** **Date: July 6, 2006** **Time: 1:30 p.m.** **Dept.: C20** Action Filed: 7/07/04 Trial Date: 8/07/06 Motion Cutoff: 7/23/06 Discovery Cutoff: 7/08/06

The motion of Defendant Mazda Motor Corporation for judgment on the pleadings came on regularly for hearing in this Court on July 6, 2006 at 1:30 p.m. Mazda Motor Corporation ("MC") was represented by its counsel of record, Bowman and Brooke LLP by Brian Takahashi, Esq. and Julian G. Senior, Esq.; plaintiffs Delbert Williamson, Alexa Williamson, through her guardian ad litem Delbert Williamson, and the Estate of Thanh Williamson, through her survivors, Delbert Williamson and Alexa Williamson, were represented by their counsel, Girardi Keese, by and through Shahram A. Shayesteh, Esq.

The Court, having read the moving papers, including the exhibits, the opposition, including the exhibits, and the reply brief, including the exhibits, having heard oral argument and considered the complexities of this case and finding good cause therefor,

IT IS HEREBY ORDERED THAT:

1. MC's motion for judgment on the pleadings is granted in part as described below;

2. On the first cause of action for strict liability, plaintiffs' claims as survivors of Thanh Williamson failed to state a claim sufficient to constitute a cause of action to the extent those claims arise from an alleged design defect or failure to warn based on the lack of a lap shoulder seat belt in the center rear seating position (where decedent Thanh Williamson was seated during the accident). Such claims are preempted, and judgment is therefore granted on the first cause of action without leave to amend as to the design defect claim, and judgment is granted with 10 days leave to amend with respect to the failure to warn claim.

3. On plaintiffs' second cause of action for negligence, plaintiffs' claims as survivors of Thanh Williamson failed to state a claim sufficient to constitute a cause of action to the extent those claims arise from an alleged design defect or failure to warn based on the existence of a lap-only seat belt in the center rear seating position (where decedent Thanh Williamson was seated during the accident). Such claims are preempted, and judgment is therefore granted on the second cause of action without leave to amend as to the design defect claim, and judgment is granted with 10 days leave to amend with respect to the failure to warn claim.

4. On plaintiffs' third cause of action, for intentional misrepresentation and concealment, plaintiffs' claims as survivors of Thanh Williamson failed to state a claim sufficient to constitute a cause of action to the extent those claims arise from an alleged design defect or failure to warn based on the existence of a lap-only seat belt in the center rear seating position (where decedent Thanh Williamson was seated during the accident). Such claims are barred by the doctrine of preemption. Such claims are preempted, and judgment is therefore granted on the third cause of action without leave to amend as to the design defect claim, and judgment is granted with 10 days leave to amend with respect to the failure to warn claim;

5. On plaintiffs' fourth cause of action, plaintiffs' claims as survivors of Thanh Williamson failed to state a claim sufficient to constitute a cause of action to the extent those claims arise from an alleged design defect or failure to warn based on the existence of a lap-only seat belt in the center rear seating position (where decedent Thanh Williamson was seated during the accident). Such claims are preempted, and judgment is therefore granted on the fourth cause of action without leave to amend as to the design defect claim, and judgment is granted with 10 days leave to amend with respect to the failure to warn claim.

IT IS SO ORDERED.

DATED: AUG 11 2006 /s/ Michael Brenner
MICHAEL BRENNER,
JUDGE OF THE
SUPERIOR COURT

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Attorneys for Defendant
MAZDA MOTOR CORPORATION
and MAZDA MOTOR OF AMERICA, INC.
dba MAZDA NORTH AMERICAN OPERATIONS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, Inc., a California corporation;	**CASE NO. 04CC06494** **Assigned: Hon. Michael Brenner** **Department: C20** **DEFENDANTS MAZDA MOTOR CORPORATION AND MAZDA MOTOR OF AMERICA, dba MAZDA NORTH AMERICAN OPERATIONS'**

FORD MOTOR COMPANY, a Delaware corporation; AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive, Defendants.	**NOTICE OF MOTION AND MOTION TO STRIKE PORTIONS OF PLAINTIFF'S THIRD AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES; [PROPOSED] ORDER** **[FILED CONCURRENTLY WITH DEMURRERS]** **Date: 9/19/06** **Time: 1:30 p.m.** **Dept.: C20** Action Filed: 7/07/04 Trial Date: 11/06/06 Motion Cutoff: 7/23/06 Discovery Cutoff: 7/08/06

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on September 19, 2006 at 1:30 p.m. or as soon thereafter as the matter may be heard, in Department "C20" of the above entitled Court, located at 700 Civic Center Drive., West, Santa Ana, California 92701, Defendants Mazda Motor Corporation ("MC") and Mazda Motor of

America, dba Mazda North American Operations ("MNAO"), will move the Court for an order striking the following portions of Plaintiff's Third Amended Complaint ("Complaint") served on or about July 18, 2006. (For the Court's convenience, Defendants have numbered the paragraphs as listed in the Third Amended Complaint):

> 17. In 1996, Congress passed the National Traffic and Motor Vehicle Safety Act of 1996, 15 U.S.C. §§ 1381-1431 (the "Safety Act"), "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. To achieve that goal, Congress empowered the federal Department of Transportation to issue minimum safety standards for motor vehicle performance. See 15 U.S.C. §§ 1391(2), 1392(a). The Department, in turn, delegated this duty to the National Highway Transportation Safety Administration ("NHTSA"). See 49 C.F.R. § 501.2. NHTSA fulfilled its responsibility by promulgating the Federal Motor Vehicle Safety Standards ("FMVSS") published at 49 C.F.R. §§ 571.1-302. The FMVSS are *minimum* standards that a vehicle must meet in order to be sold in the United States.
>
> 18. Most of the FMVSS are "performance" standards, which set forth how a vehicle must perform under certain circumstances. The most recognizable example of a performance standard is the crash testing section of the FMVSS 208, which specifies

the maximum injury criteria levels for crash test dummies in particular types of barrier impacts. The FMVSS also contain "design" standards, which dictate the parameters of how certain components are actually designed or placed in the vehicle. One example of a design standard is FMVSS 210, which dictates certain zones in which seat belt anchors are installed.

19. The Safety Act also includes a "savings" clause that provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). In *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861, the U.S. Supreme Court construed this clause as evidencing Congress' intent to "preserve" common law tort claims "that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." *Id.* at 870.

20. At the time the SUBJECT VEHICLE was manufactured, Federal Motor Vehicle Safety Standard ("FMVSS") 208 permitted auto manufacturers to install either two-point lap belts (a "Type 1" system) or three-point lap/shoulder belts (a "Type 2" system) in the rear-center seats of their cars. See 49 C.F.R. § 571.208 S.4.1.4.2. (1990).

21. The relevant version of FMVSS 208 first took effect in 1968, when NHTSA passed its initial set of motor vehicle safety

standards. See 32 Fed. Red. 2408 (February 3, 1967). At that time, FMVSS 208 required the installation of lap/shoulder belts at the drivers' and right-front passengers' seating positions, and either lap belts or lap/shoulder belts at every other designated seating position (i.e. the center front seat and all rear seats). *Id.* at 2415. In the preamble accompanying the final rule, NHTSA characterized this rule as a "minimum safety standard" within the meaning of the Safety Act. 32 Fed. Reg. at 2408. The regulatory preamble contained no further explanation of statement of policy with respect to the agency's decision to give car makers the option of installing either lap belts or lap/shoulder belts in rear seating positions. *See id.*

22. In 1986, the National Transportation Safety Board ("NTSB") issued a Safety Recommendation with respect to lap/shoulder belts. Among other things, the NTSB concluded that "lap/shoulder belts provide superior crash protection to that of lap belts alone, and present a significantly lesser risk of induced injury. . . ." The NTSB further observed that "such systems appear to work effectively even for children, and they can be used in child safety seats and booster seats." The NTSB ultimately recommended that, "[g]iven then known deficiencies of lap-only belt systems and the superior crash protection offered by belt systems that incorporate an upper torso restraint, the Safety Board believes that government and

industry should take a number of steps to reduce reliance on lap belts and increase the availability of lap/shoulder belt systems." With respect to the industry, the NTSB recommended that "early action . . . , be taken to provide aftermarket retrofit assemblies to convert lap/only belts to lap/shoulder belts." The NTSB further found that such "retrofit assemblies" may be technically feasible "at very [sic] seating location," including rear-center seats. With respect to new cars, the NTSB recommended that all rear seats – including rear center seats – be equipped with lap-shoulder belts.

23. In 1988, NHTSA proposed to amend FMVSS 208 to require lap/shoulder belts in all rear outboard seating positions of passenger cars. See 53 Fed. Reg. 47982 (November 29, 1988). In it [sic] Notice of Proposed Rulemaking, NHTSA stated that it had decided not to propose a rear-center seat requirement based on manufacturers' complaints that the costs of installing lap/shoulder belts in rear-center seats might exceed the anticipated safety benefits. See *id.* at 47984. At no point did NHTSA state that lap/shoulder belts would be unsafe in rear-center seats, or that it affirmatively sought to give car makers the unfettered choice between installing lap belts or lap/shoulder belts in that seating position. To the contrary, it emphasized that "[r]ear seat lap/shoulder belts are estimated to be more effective than rear seat lap belts in reducing

fatalities and moderate-to-severe injuries." *Id.* at 47982.

24. In 1989, NHTSA published a final rule requiring lap/shoulder belts in all rear-outboard seats, but retaining option with respect to rear-center seats. See 54 Fed. Reg. 25275 (June 14, 1989). The regulatory preamble once again emphasized that "NHTSA believes that lap/shoulder belts would be more effective than lap-only belts in rear seating positions." *Id.*

25. In June 1999, NHTSA published a study on the relative safety advantages of lap belts and lap/shoulder belts in the rear seats of cars. Among other things, the study compared the fatality risk for lap/shoulder belted occupants to the risk for lap-belted occupants. NHTSA's principal conclusion was that "[t]he change from lap to lap/shoulder belts [in rear outboard seats] *has significantly enhanced occupant protection, especially in frontal crashes.*" NHTSA added that:

> In all crashes, lap/shoulder belts are 15 percent more effective than lap belts alone. In frontal crashes, lap/shoulder belts are 25 percent more effective than lap belts alone . . . Lap/shoulder belts reduce the risk of both head and abdominal injuries in potentially fatal front crashes relative to lap belts only: head injuries by 47 percent and abdominal injuries by 52 percent.

26. In December 2002, President Bush signed into law a bill known as "Anton's Law," which provides for the improvement of child safety devices when installed in motor vehicles. See Pub. Law No. 107-318. One of the provisions of Anton's Law concerns the installation of lap/shoulder belts in rear-center seating positions. Specifically, Section 5(a) of the law directs NHTSA to amend FMVSS 208 to require lap/shoulder belts in rear-center seats by no later than December 2004.

27. Compelled by this statutory directive, on August 2003, NHTSA published a proposal to require lap/shoulder belts in all rear-center seats. 68 Fed. Reg. 46546 (august 2, 2003). At the time, NHTSA stated that Anton's Law is "fully consistent with the agency's preexisting plan to initiate rulemaking" to require lap/shoulder belts in rear-center seats. *Id.* at 46547. In its notice of proposed rulemaking, NHTSA once again emphasized the special safety benefits of lap/shoulder belts for children, stating that "one of the primary reasons for today's proposal is the increased protection that children between the ages of four and eight gain by having a lap/shoulder belt made available in rear center seating positions. When these lap/shoulder belts are installed in the rear center seating position, there will be an additional, and potentially safer, seating position available for a child in a belt-positioning booster seats." *Id.* at 46548. NHTSA further emphasized that requiring

lap/shoulder belts in rear-center seats would not just benefit children: [i]t would also benefit older occupants." *Id.*

29(a). The center seating position of the middle bench seat was equipped with an inferior and unsafe lap-only belt that did not provide adequate protection in frontal collisions because it did not restrain the upper torso of decedent Thanh Williamson, it did not prevent the body of decedent Thanh Williamson from "jackknifing" around the lap-only belt, and it was anchored at an unsafe angle to the SUBJECT VEHICLE.

31. The defects and failures alleged in paragraphs 29 and 30 above were joint and concurrent causes of Plaintiffs injuries, such that each defect and failure cannot be evaluated and adjudicated separately but must be evaluated and adjudicated together. For example, the injuries to Thanh Williamson were the result of all of the defects alleged in paragraph 29, subsections (a)-(d), each defect acting in tandem to cause her severe abdominal injuries. But for the presence of all of these defects, Thanh Williamson's injuries would not have been as severe nor would she have died from her injuries.

33. MAZDA, MAZDA AMERICA, and DOES 1 through 100, have conducted testing of lap-only seatbelts in comparison to three-point seatbelts. Those tests revealed that three-point seatbelts are far more effective in reducing abdominal, spinal, and other severe

injuries in frontal collisions when compared to lap-only seatbelts. Despite this knowledge, MAZDA, MAZDA AMERICA, and DOES 1 through 100 engaged in despicable conduct in willful and conscious disregard of the safety of consumers by choosing to utilize a lap-only seatbelt for the center seating position of the middle bench seat in the SUBJECT VEHICLE instead of a three-point seatbelts, even through three-point seatbelts were technically feasible at the time of the design and manufacture of the SUBJECT VEHICLE. Equipping the SUBJECT VEHICLE with a three-point seatbelt in that seat would have cost MAZDA, MAZDA AMERICA, and DOES 1 through 100 less than $50 per vehicle.

34. Various government-sponsored automotive safety institutes, including NHTSA, have given the SUBJECT VEHICLE the lowest possible rating in crash tests, due in large part to its poor crashworthiness and defective lap-only seat belt.

35. Despite the overwhelming evidence of the risks associated with lap belt only systems from *almost 40 years ago* to the present, MAZDA, MAZDA AMERICA, and DOES 1 through 100 have repeatedly lobbied ("NHTSA") to forego its suggested implementation of a new FMVSS which would have required three-point belts at all seating locations in motor vehicles sold to the public.

36. Despite empirical medical/scientific evidence and urgings by NHTSA and the NTSB, MAZDA, MAZDA AMERICA, and DOES 1 through 100 continued to manufacture the SUBJECT VEHICLE with lap-only belts. On August 8, 1986, the NTSB issued a safety recommendation to auto manufacturers. In this safety recommendation, the chairman of the NTSB noted that its own investigation concluded that *the crash performance of lap-only belts was "very poor."* The NTSB went on to state: "Furthermore, *the Safety Board believes that it may be technically feasible to provide 3-point, lap/shoulder belts at every seating location*; if so, such systems should be required as soon as possible. As long ago as the 1970s, the NHTSA proposed such a requirement, at least for passenger cars." The NTSB also stated: "It may be argued that the center front and center rear seating locations in passenger cars have the lowest rates of occupancy, and that therefore it is not warranted to provide the superior protection of lap/shoulder belts at these locations. *The Safety Board believes that, to the extent these seating positions are used, their occupants deserve crash protection equal to those provided for other occupants.*"

In addition, Defendants also move to strike all of Plaintiffs' failure to warn claims wherever they appear, to the extent they relate to Plaintiffs' lap-belt only theory. **Furthermore**, since Plaintiffs tie all claims relating to the death of Thanh Williamson to the barred lap-belt only claim, Defendants ask the

Court to strike all claims relating to the injuries and death of Thanh Williamson.

Defendants' Motion to Strike is based on the grounds that these portions of the Third Amended Complaint constitute irrelevant and/or improper matter, and were not drawn in conformance with the laws of this state, this Court's rulings and the permission the Court granted Plaintiffs to amend. The Court already ruled that Plaintiffs may not assert causes of action based upon the fact that the vehicle had a lap belt only when MC moved for judgment on the pleadings as to the Second Amended Complaint. Moreover, no failure to warn claim can be based on the lap-belt only use in the MPV. Defendants' Motion to Strike is brought pursuant to California Civil Code Section 3294(b), and California Code of Civil Procedure Sections 435 and 436.

This Motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the records and pleadings on file herein, including MC's Motion for Judgment on the Pleadings and the Court's Ruling thereon, upon the concurrently filed Demurrers and supporting papers, and on such further oral and documentary evidence as may be presented to the Court at the hearing of this matter.

Dated: August 22, 2006

BOWMAN AND BROOKE LLP

By: /s/ [Illegible]
Brian Takahashi
Robert S. Robinson
Julian G. Senior
Attorneys for Defendant
MAZDA MOTOR CORPORATION and MAZDA MOTOR OF AMERICA, INC. dba MAZDA NORTH AMERICAN OPERATIONS

MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION: PLAINTIFFS' FAILURE TO WARN CLAIMS, LIKE THE UNDERLYING DEFECT CLAIMS, ARE PREEMPTED

Three undisputable points mandate that Plaintiffs' additional irrelevant material, including reassertion of preempted claims must be stricken:

1. This Court has already determined that any defect claim based upon MC's use of a 2-point safety belt, instead of a 3-point belt, are preempted;

2. A failure to warn claim cannot be based upon a preempted claim;

3. As Plaintiffs admit by their pleadings, their failure to warn claim is based on the same claim of defect – the use of the 2-point belt – that the Court has already found preempted.

Plaintiff *again* alleges causes of action based upon the fact that the subject MPV contains a lap belt only (and not a 3-point belt) as authorized by Federal Motor Vehicle Safety Standards ("FMVSS") 208 instead of a lap/shoulder belt. The Court specifically, ruled that these claims are preempted under *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861. Further, despite the fact that this Court only granted Plaintiffs leave to amend to "flush out" their other (non lap belt-related) grounds to asserting liability bases of liability, and to assert a failure to warn claim, Plaintiffs instead have *added* a whopping 17 paragraphs which address the lap belt only claims. Further, plaintiffs have alleged causes of action based upon defendants' failure to warn of the dangers associated with the use of lap-belt only restraint systems. These improper and irrelevant matters should be stricken.

2. ARGUMENT

A. THE THIRD AMENDED COMPLAINT CONFLICTS WITH THIS COURT'S PRIOR RULING.

After lengthy briefing and argument by both parties, the Court clearly granted Defendants' Motion for Judgment on the Pleadings, rejecting claims based

on MC's election of the option to use 2-point safety belts. The Plaintiffs, however, have again pleaded, and in fact expounded upon, those claims in their Third Amended Complaint. See July 6, 2006 Reporter's Transcript, attached as Exhibit "A" to the Declaration of Julian Senior which accompanies Defendants' Demurrers).[1]

At the July 6 hearing, the Court made its position clear:

> THE COURT: THEN ADDRESSING THE PREEMPTION ARGUMENT HAVING TO DO WITH ANY INJURY THAT WOULD HAVE ARISEN BECAUSE THEY HAD LAP BELT ONLY SEATS AS OPPOSED TO THE LAP BELT AND SHOULDER SEATS, I BELIEVE THE MOVING PARTY IS CORRECT IN THAT REGARD.
>
> IT APPEARS TO ME THAT FEDERAL LAW AND FEDERAL POLICY DEVELOPED IN ALL THESE ARGUMENTS ABOUT THE PLAN THE DEPARTMENT OF THE TRANSPORTATION HAD FOR PHASING IN PASSENGER RESTRAINTS, *WOULD PRECLUDE A STATE COURT TORT ACTION THAT WOULD HAVE SUBSTANTIAL IMPACT ON THE FEDERAL SCHEME.*

RT at 9:14-24-10:1 (emphasis added.)

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[1] Defendants are unaware whether this Court has signed the order granting judgment in favor of MC.

The Court also made the limited scope of its leave to amend clear:

> THE COURT: SO THOSE THEORIES OF LIABILITY AS TO – FOR THE DECEDENT'S DEATH WOULD SURVIVE, DOESN'T SURVIVE AS TO THE LAP-BELT CLAIM.
>
> . . .
>
> SO MY INCLINATION IS TO GRANT THEM LEAVE TO FILED A THIRD AMENDED COMPLAINT, WHICH I UNDERSTAND MAYBE DOESN'T ADD NEW THEORIES, IT IS JUST MORE OR LESS FLUSHING OUT THE IDEA THAT THERE WERE OTHER SIMULTANEOUSLY – SIMULTANEOUS CAUSES OR BASIS OF LIABILITY TO THE DECEDENT'S DEATH.

RT 10:8-10, 18-23.

The Court also noted its skepticism of Plaintiffs' claimed ability to state a viable a failure to warn claim:

> MR. SHAYESETH: THAT IS NOT THE THEORY, YOUR HONOR. THE THEORY IS THEY FAILED TO WARN ABOUT THE DANGERS OF A LAP-ONLY BELT. SO IT IS NOT THAT THEY'RE FAILING TO WARN THAT YOU COULD HAVE A THREE-POINT, YOU COULD HAVE THIS, THAT IS NOT WHAT WE'RE TALKING ABOUT. THAT IS –

. . .

> IT SEEMS TO ME THE THEORY WOULD BE THE SAME, THE SAME PREEMPTION THEORY. THAT IS THE DEPARTMENT OF TRANSPORTATION HAS SET UP THIS PHASE-IN SCHEME THAT THEY HAD BASED ON THEIR PRIOR HISTORY OF TRYING TO COMPEL SOME KIND OF RESTRAINT. AND, SO, A FAILURE TO WARN CAUSE OF ACTION WOULD INTERFERE WITH THAT SCHEME.

RT 12:10-14; 13:13-18.

Despite this clear ruling by the Court, Plaintiffs have improperly added 17 paragraphs to the Third Amended Complaint which only deal with the lap-belt claim and asserted a failure to warn claim based on the alleged "defect" of a lap-belt only claim.

B. PLAINTIFF LACKED PERMISSION TO FILE THE CLAIMS ASSERTED IN THE THIRD AMENDED COMPLAINT.

When a trial court grants leave to amend, the scope of the permissible amendment generally is limited to the cause of action to which the demurrer was sustained with leave to amend. *See People v.* Clausen (1967) 248 Cal.App.2d 770, 785-86; *See also* Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), section 7:148.1a, p. 7-55. In this matter, the Court granted MC's motion for judgment on the pleadings "to the extent of that

theory of liability of the lap only seat belt." The Court gave plaintiffs leave to amend which would involve a failure to warn claim or "more or less flushing out the idea that there were other . . . simultaneous causes or [bases] of liability to the decedent's death." (RT at 10).

Instead of "flushing out" plaintiffs' other causes of Mrs. Williamson's death, or asserting the independent failure to warn claim, Plaintiffs have added 17 new paragraphs which go to the barred lap belt only claims. Plaintiffs are improperly and nakedly reasserting their barred claims. This Court did not grant plaintiffs leave to replead the lap belt only claims. As such, these new allegations should be stricken.

C. AS PLAINTIFFS ADMIT, ALL OF THEIR CLAIMS RELATING TO THE DEATH OF THANH WILLIAMSON RISE, AND HERE MUST FALL, WITH THE ALREADY BARRED LAP BELT ONLY CLAIMS.

In paragraph 29(a) of their TAC, Plaintiffs assert as follows:

> The center seating position of the middle bench seat was equipped with an inferior and unsafe lap-only belt that did not provide adequate protection in frontal collisions because it did not restrain the upper torso of decedent Thanh Williamson, it did not prevent the body of decedent Thanh Williamson from "jackknifing" around the lap-only belt,

> and it was anchored at an unsafe angle to the SUBJECT VEHICLE.

To remove *any* doubt that they claim Thanh Williamson's death arises from the lap-only belt, Plaintiffs assert that *all* of their claims – relating to Thanh Williamson – *are* based on that claim:

> The defects and failures alleged in paragraphs 29 and 30 above were joint and concurrent causes of Plaintiffs injuries, such that each defect and failure cannot be evaluated and adjudicated separately but must be evaluated and adjudicated together.

(TAC ¶ 31).

As MC understands it, Plaintiffs claim that none of Thanh Williamson's injuries would have occurred but for the "defect" of the MPV being equipped with the lap-only belt in the rear center seat. But this Court already determined that the option granted by NHTSA – use of a lap-only belt in the rear center seat – cannot be the basis of a defect. It is a preempted claim. Thus, by *Plaintiffs' own definitions*, all other claims relating to the death of Thanh Williamson are preempted.

D. PLAINTIFFS' FAILURE TO WARN CLAIM ABOUT THE LAP ONLY BELT IS PREEMPTED.

Just like Plaintiffs' assertions that MC should have used a 3-point belt in Mrs. Williamson's seating position rather than selecting the other option (a

2-point belt), Plaintiffs' failure to warn claims are preempted by FMVSS 208. At the hearing on MC's Motion for Judgment on the Pleadings, Plaintiffs cited *Carlin v. Superior Court* (1996) 13 Cal.4th 1104 and *Persons v. Salomon North America, Inc.* (1990) 217 Cap.App.3d 168 as holding that a failure to warn claim is protected from preemption. Defendants anticipate that Plaintiffs will make the same arguments in response to Defendants' Motion to Strike and Demurrers. But these cases provide no support for Plaintiffs' position.

Carlin involved an alleged failure to warn by Upjohn concerning the prescription drug Halcion. *Id.* at 1109. Although Upjohn apparently made a claim that a failure to warn theory was "inconsistent with federal regulatory policy," the court rejected that general proposition.

But Upjohn did not show, as Defendants have shown here, that it was being sued for its choosing one of two options offered by a federal regulatory agency. Here, one must remember that Plaintiffs assert Defendants' liability based upon MC's decision to use a 2-point belt, which was one of the options provided to it, as opposed to taking the other option (a 3-point belt). Nowhere in the *Carlin* opinion does it indicate that Upjohn, when labeling Halcion, had two options, chose one, and that the Plaintiff asserted liability on a claim that Upjohn should have chosen the other option. Thus, *Carlin is* simply inapposite to this matter.

Similarly, *Persons v. Salomon North America* is of no assistance. Plaintiff suffered injuries in a skiing accident, which occurred while she was wearing rented skis equipped with Salomon ski bindings and while wearing untreated thermal plastic boots. Id. at 170-171. Plaintiff claimed that the Salomon bindings were not compatible with that type of boot, and that she should have been so warned. *Persons* did not involve any preemption issue, nor the choice of any federally-provided options on which plaintiff based liability. Indeed, the Court of Appeal *affirmed* the judgment in favor of the *defendant* that it did not need to provide a warning directly to the consumer. *Persons* has no conceivable application to this case.

Those cases that do address similar facts hold that, since MC cannot be liable for selecting one of the two options available to it, there cannot be a duty to warn of any "danger" from its selection of that option. *See James v. Mazda Motor Corp.* (11th Cir. 2000) 222 F.3d 1323, 1324-27 (FMVSS 208 preempted claim that Mazda "failed to warn consumers that the [vehicle] was dangerous unless the manual lap belt was worn" in automatic shoulder/manual lap belt system); *Irving v. Mazda Motor* Corp. (11th Cir. 1998) 136 F.3d 764, 766, 770 (FMVSS 208 preempted claim that Mazda did not adequately warn of "the risks of not utilizing all portions – particularly the manual lap belt portion – of the safety belt system"); *Moser v. Ford Motor Co.,* 28 Fed. Appx. 168, 170, 172, 2001 WL 1387600 (4th Cir. 2001) (FMVSS 208 preempted claim that "Ford's warning to occupants to use the lap

belt was inadequate"); *Carrasquilla v. Mazda Motor Corp.* (M.D. Pa. 2001) 166 F. Supp. 2d 169, 174, 180 (FMVSS 208 preempted claim of inadequate "warnings regarding the hazard associated with not wearing the lap belt"); *Osman v. Ford Motor Co.* (Ill. App. 2005) 833 N.E.2d 1011, 1014 (FMVSS 208 preempted claim that Ford inadequately warned about alleged hazards of "use of passive two-point shoulder-belt assembly without latching the manual lap belt").

Moser and *Osman* both made it clear that, if the underlying defect allegation is preempted, so is a failure to warn claim. As the *Moser* court put it, the plaintiffs "inadequate warning theory is, at bottom, based on a claim that the [Camry's] two-point passive system was unsafe without the use of the lap belt. . . . [T]hat claim is preempted by the FMVSS under Geier. Because we are precluded in this case from finding any duty on [Toyota's] part to provide the manual lap belt, [Toyota] can have no corresponding duty to warn occupants to use the lap belt." 28 Fed. Appx. at 172. *Osman* specifically stated the manufacturer's selection of a NHTSA option forecloses both a defect claim and a derivative failure to warn claim, because the latter, just like the defect claim, "would effectively foreclose use of the option that [Toyota] certified the restraint system under because that option does not require the use of a manual lap belt." *Osman, supra,* 833 N.E.2d at 1021.

In *Carrasquilla, supra,* the court found that plaintiffs' inadequate warnings claims failed:

> [P]laintiffs' warnings claims are preempted to the extent that they challenged defendants' restraint options choice under FMVSS 208. Specifically, plaintiffs' claim that inadequate warnings regarding the shoulder-only automatic belts employed by defendants pursuant to federal regulations constitute a design defect is preempted.

Carrasquilla, 166 F. Supp.2d at 180; accord, *Irving, supra,* 136 F.3d at 770 ("Because Plaintiffs defective-design claim is preempted by FMVSS 208, there was no defect about which to warn. Plaintiffs failure-to-warn claim – which is, in this case, dependent on the preempted defective-design claim – was properly dismissed.")

As set forth previously in this case and below in the Memorandum, the courts which have interpreted *Geier* unanimously agree that FMVSS allows several choices of seat belts. If a plaintiffs lawsuit "would foreclose an option specifically permitted by FMVSS 208," that lawsuit conflicts with the federal law and is therefore preempted. *Griffith, supra* 303 F.3d at 1282. As this Court has previously recognized, FMVSS 208 had the purpose of encouraging automobile manufacturers to use one of several different seat belt design options. Plaintiffs now suggest that any manufacturer who sold a vehicle with the federally mandated option of a 2-point restraint in the rear, center seat must accompany the sale of the vehicle with some sort of "warning" that the subject vehicle was "defective, uncrashworthy and unsafe."

(TAC ¶ 45). This requirement interferes with the purposes of FMVSS 208.

It is clear that Plaintiffs' failure to warn theory, if countenanced by this Court, would present the same conflict with the language and purposes behind FMVSS 208 as a defective design claim. Therefore, a failure to warn claim, which does nothing more than penalize a federally-granted option, violates the holding of *Geier*. As this Court noted, Plaintiffs want manufacturers to tell customers that use of the federally-mandated restraint system renders the vehicle dangerous. Accordingly, Plaintiffs' failure to warn claim, as it is based upon the use of the lap-belt only, is preempted.

E. THE LAP BELT ONLY ALLEGATIONS ARE PRE-EMPTED BY FEDERAL LAW.

As this Court already ruled, in *Geier v. American Honda Motor Co., Inc.* and its progeny, FMVSS 208 preempts claims, like plaintiffs' here, that would take away FMVSS 208's choice between a lap belt or a lap/shoulder combination. For example, in *Hurley v. Motor Coach Indus., Inc.* (7th Cir. 2000) 222 F.3d 377, *cert. den.* (2001) 531 U.S. 1148, a bus driver argued that his bus was defectively designed because it provided only a two-point lap belt. *Id* at 378, 381. Plaintiff claimed, *inter alia*, that defendant should have installed a three-point belt. *Id.* at 380-81. The

Seventh Circuit held that FMVSS 208 and *Geier* preempted the suit:

> NHTSA's decision to leave the manufacturers . . . with the option of using a two point seat belt that met regulatory standards is quite understandable as a way of promoting safety by encouraging drivers to use the safety equipment that manufacturers install. But [plaintiffs] proposal unequivocally requires a three point seat belt, a requirement that could reduce utilization and thereby undermine FMVSS 208's safety objectives. . . . The point is that, as in *Geier*, the decision to leave options open to bus manufacturers was made with specific policy objectives in mind. Hurley's suit, if successful, would undermine that policy objective and is therefore preempted.

Id. at 382. Thus, the court continued, "*Geier* confirms . . . that a state lawsuit that forecloses an option left open by FMVSS 208 is in fact preempted." *Id.* "We conclude that the Supreme Court's opinion in *Geier* governs Hurley's case and compels the conclusion that when a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suits that depends on foreclosing one or more those options is preempted." *Id.* at 383.

Similarly, *Griffith v. General Motors Corp.* (11th Cir. 2002) 303 F.3d 1276, *cert. den.* (2003) 538 U.S. 1023, held that *Geier* and FMVSS 208 preempted a claim that would impose liability for using a two-point belt rather than a three-point belt. FMVSS 208

allowed GM the option to install either a two-point lap belt or a three-point lap/shoulder belt for plaintiffs seating position. *Id.* at 1278. GM had chosen the lap belt. *Id.* Plaintiffs claimed that the vehicle was "defective because of the lap belt only design" for plaintiffs position. *Id.* at 1278-79. The Eleventh Circuit held that the claim was preempted because it would take away the FMVSS 208 option to use a lap-only belt, and require the manufacturer to use the lap/shoulder combination belt instead. FMVSS 208 "does not mandate any particular type of restraint, but rather requires manufacturers to choose from several specific options in installing a restraint system in their passenger cars and trucks." *Id.* at 1279. Under FMVSS 208, General Motors was "free to install . . . either a lap belt for pelvic restraint or a shoulder/lap belt combination system." *Id.* "If successful, [plaintiffs] suit would foreclose an option specifically permitted by FMVSS 208. Therefore, it conflicts with that federal law and is impliedly preempted." *Id.* at 1282.

Still again, the Massachusetts Court of Appeals held that FMVSS 208 preempted based on failure to use a lap/shoulder belt combination in *Heinricher v. Volvo Car Corp.* (Mass. App. 2004) 809 N.E.2d 1094. Plaintiff there was "wearing a two-point lap belt" and riding in the rear seat of a Volvo sedan. *Id.* at 1095. The plaintiff sued in negligence and breach of warranty, asserting that the vehicle "was defective because it lacked a three-point lap-shoulder harness in the rear center seat" that he occupied. *Id.*

Following *Geier*, *Griffith*, and *Hurley*, the court held that FMVSS 208 "plainly provided Volvo . . . with the option of installing *either* a two-point lap belt *or* a three-point lap-shoulder harness in the rear center seat of its vehicles." *Id.* at 1098. Plaintiffs' action "would hold the defendants liable for choosing one Federally-approved passenger restraint system over another." *Id.* That "would conflict with and stand as an obstacle to the implementation of the comprehensive safety scheme promulgated in Standard 208," so plaintiffs' claims "are preempted as a matter of law." 809 N.E.2d at 1098.

This case is the same. FMVSS 208 granted MC the option to use a lap-only belt or a lap/shoulder belt combination. Mazda chose to use the lap-only belt. Plaintiff seeks to impose a duty to use the lap/shoulder belt. That is the exact claim held preempted by *Hurley, Griffith* and *Heinricher,* and takes away the federally-granted option just as *in Geier.* It is accordingly preempted.

3. CONCLUSION

Based on the foregoing, MC and MNAO respectively request that this Court grant their Motion to Strike without leave to amend.

Dated: August 22, 2006

BOWMAN AND BROOKE LLP

By: /s/ [Illegible]
Brian Takahashi
Robert S. Robinson
Julian G. Senior
Attorneys for Defendant
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, Inc., a California corporation;	**CASE NO. 04CC06494** **Assigned:** **Hon. Michael Brenner** **Department: C20** **DEFENDANTS MAZDA MOTOR CORPORATION AND MAZDA MOTOR OF AMERICA, dba MAZDA NORTH AMERICAN OPERATIONS' NOTICE OF DEMURRER AND DEMURRER TO**

FORD MOTOR COMPANY, a Delaware corporation; AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive, Defendants.	**PLAINTIFFS' THIRD AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JULIAN G. SENIOR; [PROPOSED] ORDER** **Date: 9/19/06** **Time: 1:30 p.m.** **Dept.: C20** Action Filed: 7/07/04 Trial Date: 8/07/06 Motion Cutoff: 7/23/06 Discovery Cutoff: 7/08/06

TO ALL PARTIES AND THEIR COUNSEL OF RECORD HEREIN:

PLEASE TAKE NOTICE that, on September 19, 2006 at 1:30 p.m. or as soon thereafter as the matter may be heard, in Department "C20" of the above-referenced Court, located at 700 Civic Center Drive West, Santa Ana, California, Defendant Mazda Motor Corporation ("MC") will and does hereby demur to Plaintiffs' Third Amended Complaint. Authority for this Motion is found both in California Code of Civil Procedure Section 430.10(e) and under the common law.

This motion is based upon the grounds that the causes of action set forth in plaintiffs' Third Amended Complaint fail to state sufficient facts to constitute a cause of action. Defendants' demurrer will be heard in conjunction with its motion to strike and is made pursuant to C.C.P. §§ 430.10 and 430.30 et seq.

This demurrer is based upon this Notice of Motion and Motion, Defendants' Motion to Strike and accompanying materials, the attached Memorandum of Points and Authorities, all matters of which the Court may take judicial notice, all other records and pleadings on file with the Court herein, including MC's Motion for Judgment on the Pleadings and the Court's ruling thereon, and upon such further oral and documentary evidence as may be presented at the hearing on this Motion.

DATED: August 22, 2006

BOWMAN AND BROOKE LLP

By: /s/ [Illegible]
Brian Takahashi
Robert S. Robinson
Julian G. Senior
Attorneys for Defendants
MAZDA MOTOR CORPORATION
and MAZDA MOTOR OF AMERICA,
INC. dba MAZDA NORTH AMERICAN
OPERATIONS

DEMURRERS TO THIRD AMENDED COMPLAINT

Defendants MC and MNAO respectfully demur to plaintiffs' Third Amended Complaint as follows:

FIRST CAUSE OF ACTION

MC and MNAO hereby demur to this cause of action on the grounds that it fails to state sufficient facts to constitute a cause of action. C.C.P. § 430.10(a).

SECOND CAUSE OF ACTION

MC and MNAO hereby demur to this cause of action on the grounds that it fails to state sufficient facts to constitute a cause of action. C.C.P. § 430.10(a).

THIRD CAUSE OF ACTION

MC and MNAO hereby demur to this cause of action on the grounds that it fails to state sufficient facts to constitute a cause of action. C.C.P. § 430.10(a).

FOURTH CAUSE OF ACTION

MC and MNAO hereby demur to this cause of action on the grounds that it fails to state sufficient facts to constitute a cause of action. C.C.P. § 430.10(a).

WITHOUT LEAVE TO AMEND

MC and MNAO request that leave to amend not be granted as amendment would be futile.

DATED: August 22, 2006

BOWMAN AND BROOKE LLP

By: /s/ [Illegible]
Brian Takahashi
Robert S. Robinson
Julian G. Senior
Attorneys for Defendants
MAZDA MOTOR CORPORATION
and MAZDA MOTOR OF AMERICA,
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OPERATIONS

MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION: PLAINTIFFS' FAILURE TO WARN CLAIMS, LIKE THE UNDERLYING DEFECT CLAIMS, ARE PREEMPTED

Three undisputable points mandate that Plaintiffs' claims do not state a cause of action as a matter of law.

1. This Court has already determined that any defect claim based upon MC's use of a 2-point safety belt, instead of a 3-point belt, are preempted;

2. A failure to warn claim cannot be based upon a preempted claim;

3. As Plaintiffs admit by their pleadings, their failure to warn claim is based on the same claim of defect – the use of the 2-point belt – that the Court has already found preempted.

Plaintiff *again* alleges causes of action based upon the fact that the subject MPV contains a lap belt only (and not a 3-point belt) as authorized by Federal Motor Vehicle Safety Standards ("FMVSS") 208 instead of a lap/shoulder belt. The Court specifically ruled that these claims are preempted under *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861. Further, despite the fact that this Court only granted Plaintiffs leave to amend to "flush out" their other (non lap belt-related) grounds to asserting liability bases of liability, and to assert a failure to warn claim, Plaintiffs instead have *added* 17 paragraphs which address the lap belt only claims. Further, plaintiffs have alleged causes of action based upon defendants' failure to warn of the dangers associated with the use of lap-belt only restraint systems. This Court should sustain Defendants' demurrer as to all those causes of action as they relate to the death of Thanh Williamson.

2. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Delbert Williamson and Alexa Williamson allege that on August 14, 2002, they and the decedent Thanh Williamson were traveling in their 1993 Mazda MPV Minivan when it was struck head-on by a 1998 Jeep Wrangler that had crossed

the center divider line of a Utah highway, after the Jeep detached from a motor home being driven by Jack W. Bonzelaar. Third Amended Complaint ("TAC"), ¶ 1.

Plaintiffs alleged that they and Thanh Williamson were all wearing seat belts. Further, they claim that Thanh Williamson "was killed when the forces generated by this collision . . . caused her body to 'jackknife' around her defective lap belt, causing severe abdominal injuries and internal bleeding." TAC, ¶ 2.

Plaintiffs initiated this case on June 7, 2004 and filed a Second Amended Complaint ("SAC") on or about June 27, 2005. MC filed a Motion for Judgment on the Pleadings as to plaintiffs' lap-belt only claims in the SAC which was heard on July 6, 2006. At the hearing on MC's motion, this Court granted judgment against plaintiffs on their claims based upon the fact the subject vehicle had a lap-belt only seat belt in Mrs. Williamson's seating position as opposed to a lap/shoulder belt. The Court granted plaintiffs leave to file a Third Amended Complaint but only to the extent it would flush out plaintiffs' other claims. Plaintiffs filed their Third Amended Complaint; however, in contrast to this Court's directive, plaintiffs *added* 17 new paragraph's relating to the lap-belt only issue. Further, plaintiffs have now asserted all the claims based upon Mrs. Williamson's death are inextricably tied to the lap-belt only claims. As such, this demurrer should be sustained.

3. ARGUMENT

A. THE THIRD AMENDED COMPLAINT CONFLICTS WITH THIS COURT'S PRIOR RULING.

After lengthy briefing and argument by both parties, the Court clearly granted Defendants' Motion for Judgment on the Pleadings, rejecting claims based on MC's election of the option to use 2-point safety belts. The Plaintiffs, however, have again pleaded, and in fact expounded upon, those claims in their Third Amended Complaint. (See July 6, 2006 Reporter's Transcript, attached as Exhibit "A" to the Declaration of Julian Senior which accompanies Defendants' Demurrers).[1]

At the July 6 hearing, the Court made its position clear that it was granting the motion to judgment on the pleadings as to all of plaintiffs' claims based upon the use of a lap belt only system in the subject vehicle. The Court allowed plaintiffs to "flush out" other defect allegations which relate to Mrs. Williamson's death.

(See Discussion in Defendants' Motion to Strike and accompanying materials).

Despite the clear ruling by the Court, Plaintiffs have improperly added 17 paragraphs to the Third Amended Complaint which only deal with the lap-belt

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[1] Defendants are unaware whether this Court has signed the order granting judgment in favor of MC.

claim and asserted a failure to warn claim based on the alleged "defect" of a lap-belt only claim.

B. PLAINTIFF LACKED PERMISSION TO FILE THE CLAIMS ASSERTED IN THE THIRD AMENDED COMPLAINT.

When a trial court grants leave to amend, the scope of the permissible amendment generally is limited to the cause of action to which the demurrer was sustained with leave to, amend. *See People v. Clausen* (1967) 248 Cal.App.2d 770, 785-86; *See also* Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), section 7:148.1a, p. 7-55. In this matter, the Court granted MC's motion for judgment on the pleadings "to the extent of that theory of liability of the lap only seat belt." The Court gave plaintiffs leave to amend which would involve a failure to warn claim or "more or less flushing out the idea that there were other . . . simultaneous causes or [bases] of liability to the decedent's death." (RT at 10).

Instead of "flushing out" plaintiffs' other causes of Mrs. Williamson's death, or asserting the independent failure to warn claim, Plaintiffs have added 17 new paragraphs which go to the barred lap belt only claims. Plaintiffs are improperly and nakedly reasserting their barred claims. This Court did not grant plaintiffs leave to replead the lap belt only claims, and the Court has already granted judgment on the pleadings in this issue.

C. AS PLAINTIFFS ADMIT, ALL OF THEIR CLAIMS RELATING TO THE DEATH OF THANH WILLIAMSON RISE, AND HERE MUST FALL, WITH THE ALREADY BARRED LAP BELT ONLY CLAIMS.

In paragraph 29(a) of their TAC, Plaintiffs assert as follows:

> The center seating position of the middle bench seat was equipped with an inferior and unsafe lap-only belt that did not provide adequate protection in frontal collisions because it did not restrain the upper torso of decedent Thanh Williamson, it did not prevent the body of decedent Thanh Williamson from "jackknifing" around the lap-only belt, and it was anchored at an unsafe angle to the SUBJECT VEHICLE.

To remove *any* doubt that they claim Thanh Williamson's death arises from the lap-only belt, Plaintiffs assert that *all* of their claims – relating to Thanh Williamson – *are* based on that claim:

> The defects and failures alleged in paragraphs 29 and 30 above were joint and concurrent causes of Plaintiff's injuries, such that each defect and failure cannot be evaluated and adjudicated separately but must be evaluated and adjudicated together.

(TAC 31).

As MC understands it, Plaintiffs claim that none of Thanh Williamson's injuries would have occurred

but for the "defect" of the MPV being equipped with the lap-only belt in the rear center seat. But this Court already determined that the option granted by NHTSA – use of a lap-only belt in the rear center seat – cannot be the basis of a defect. It is a preempted claim. Thus, by *Plaintiffs' own definitions*, all other claims relating to the death of Thanh Williamson are preempted.

D. PLAINTIFFS' FAILURE TO WARN CLAIM ABOUT THE LAP ONLY BELT IS PRE-EMPTED.

Just like Plaintiffs' assertions that MC should have used a 3-point belt in Mrs. Williamson's seating position rather than selecting the other option (a 2-point belt), Plaintiffs' failure to warn. claims are preempted by FMVSS 208. At the hearing on MC's Motion for Judgment on the Pleadings, Plaintiffs cited *Carlin v. Superior Court* (1996) 13 Cal.4th 1104 and *Persons v. Salomon North America, Inc.* (1990) 217 Cap.App.3d 168 as holding that a failure to warn claim is protected from preemption. Defendants anticipate that Plaintiffs will make the same arguments in response to Defendants' Motion to Strike and Demurrers. These cases provide no support for Plaintiffs' position.

Carlin involved an alleged failure to warn by Upjohn concerning the prescription drug Halcion. *Id.* at 1109. Although Upjohn apparently made a claim that a failure to warn theory was "inconsistent with

federal regulatory policy," the court rejected that general proposition.

But Upjohn did not show, as Defendants have shown here, that it was being sued for its choosing one of two options offered by a federal regulatory agency. Here, one must remember that Plaintiffs assert Defendants' liability based upon MC's decision to use a 2-point belt, which was one of the options provided to it, as opposed to taking the other option (a 3-point belt). Nowhere in the *Carlin* opinion does it indicate that Upjohn, when labeling Halcion, had two options, chose one, and that the Plaintiff asserted liability on a claim that Upjohn should have chosen the other option. Thus, *Carlin* is simply inapposite to this matter.

Similarly, *Persons v. Salomon North America* is of no assistance. Plaintiff suffered injuries in a skiing accident, which occurred while she was wearing rented skis equipped with Salomon ski bindings and while wearing untreated thermal plastic boots. *Id.* at 170-171. Plaintiff claimed that the Salomon bindings were not compatible with that type of boot, and that she should have been so warned. *Persons* did not involve any preemption issue, nor the choice of any federally-provided options on which plaintiff based liability. Indeed, the Court of Appeal *affirmed* the judgment in favor of the *defendant* that it did not need to provide a warning directly to the consumer. *Persons* has no conceivable application to this case.

Those cases that do address similar facts hold that, since MC cannot be liable for selecting one of the two options available to it, there cannot be a duty to warn of any "danger" from its selection of that option. *See James v. Mazda Motor Corp.* (11th Cir. 2000) 222 F.3d 1323, 1324-27 (FMVSS 208 preempted claim that Mazda "failed to warn consumers that the [vehicle] was dangerous unless the manual lap belt was worn" in automatic shoulder/manual lap belt system); *Irving v. Mazda Motor Corp.* (11th Cir. 1998) 136 F.3d 764, 766, 770 (FMVSS 208 preempted claim that Mazda did not adequately warn of "the risks of not utilizing all portions - particularly the manual lap belt portion – of the safety belt system"); *Moser v. Ford Motor Co.*, 28 Fed. Appx. 168, 170, 172, 2001 WL 1387600 (4th Cir. 2001) (FMVSS 208 preempted claim that "Ford's warning to occupants to use the lap belt was inadequate"); *Carrasquilla v. Mazda Motor Corp.* (M.D. Pa. 2001) 166 F. Supp. 2d 169, 174, 180 (FMVSS 208 preempted claim of inadequate "warnings regarding the hazard associated with not wearing the lap belt"); *Osman v. Ford Motor Co.* (Ill. App. 2005) 833 N.E.2d 1011, 1014 (FMVSS 208 preempted claim that Ford inadequately warned about alleged hazards of "use of passive two-point shoulder-belt assembly without latching the manual lap belt").

Moser and *Osman* both made it clear that, if the underlying defect allegation is preempted, so is a failure to warn claim. As the *Moser* court put it, the plaintiff's "inadequate warning theory is, at bottom,

based on a claim that the [Camry's] two-point passive system was unsafe without the use of the lap belt. . . . [T]hat claim is preempted by the FMVSS under *Geier*. Because we are precluded in this case from finding any duty on [Toyota's] part to provide the manual lap belt, [Toyota] can have no corresponding duty to warn occupants to use the lap belt." 28 Fed. Appx. at 172. *Osman* specifically stated the manufacturer's selection of a NHTSA option forecloses both a defect claim and a derivative failure to warn claim, because the latter, just like the defect claim, "would effectively foreclose use of the option that [Toyota] certified the restraint system under because that option does not require the use of a manual lap belt." *Osman, supra*, 833 N.E.2d at 1021.

In *Carrasquilla, supra*, the court found that plaintiffs' inadequate warnings claims failed:

> [P]laintiffs' warnings claims are preempted to the extent that they challenged defendants' restraint options choice under FMVSS 208. Specifically, plaintiffs' claim that inadequate warnings regarding the shoulder-only automatic belts employed by defendants pursuant to federal regulations constitute a design defect is preempted.

Carrasquilla, 166 F. Supp.2d at 180; *accord, Irving, supra*, 136 F.3d at 770 ("Because Plaintiff's defective-design claim is preempted by FMVSS 208, there was no defect about which to warn. Plaintiff's failure-to-warn claim – which is, in this case, dependent on the

preempted defective-design claim – was properly dismissed.")

As set forth previously in this case and below in the Memorandum, the courts which have interpreted *Geier* unanimously agree that FMVSS allows several choices of seat belts. If a plaintiff's lawsuit "would foreclose an option specifically permitted by FMVSS 208," that lawsuit conflicts with the federal law and is therefore preempted. *Griffith, supra* 303 F.3d at 1282. As this Court has previously recognized, FMVSS 208 had the purpose of encouraging automobile manufacturers to use one of several different seat belt design options. Plaintiffs now suggest that any manufacturer who sold a vehicle with the federally mandated option of a 2-point restraint in the rear, center seat must accompany the sale of the vehicle with some sort of "warning" that the subject vehicle was "defective, uncrashworthy and unsafe." (TAC ¶ 45). This requirement interferes with the purposes of FMVSS 208.

It is clear that Plaintiffs' failure to warn theory, if countenanced by this Court, would present the same conflict with the language and purposes behind FMVSS 208 as a defective design claim. Therefore, a failure to warn claim, which does nothing more than penalize a federally-granted option, violates the holding of *Geier*. As this Court noted, Plaintiffs want manufacturers to tell customers that use of the federally-mandated restraint system renders the vehicle dangerous. Accordingly, Plaintiffs' failure to warn claim, as it is based upon the use of the lap-belt

only, is preempted and this demurrer must be sustained.

E. THE LAP BELT ONLY ALLEGATIONS ARE PRE-EMPTED BY FEDERAL LAW.

As this Court already ruled, in *Geier v. American Honda Motor Co., Inc.* and its progeny, FMVSS 208 preempts claims, like plaintiffs' here, that would take away FMVSS 208's choice between a lap belt or a lap/shoulder combination. For example, in *Hurley v. Motor Coach Indus., Inc.* (7th Cir. 2000) 222 F.3d 377, *cert. den.* (2001) 531 U.S. 1148, a bus driver argued that his bus was defectively designed because it provided only a two-point lap belt. *Id.* at 378, 381. Plaintiff claimed, *inter alia*, that defendant should have installed a three-point belt. *Id.* at 380-81. The Seventh Circuit held that FMVSS 208 and *Geier* preempted the suit:

> NHTSA's decision to leave the manufacturers . . . with the option of using a two point seat belt that met regulatory standards is quite understandable as a way of promoting safety by encouraging drivers to use the safety equipment that manufacturers install. But [plaintiff's] proposal unequivocally requires a three point seat belt, a requirement that could reduce utilization and thereby undermine FMVSS 208's safety objectives. . . . The point is that, as in *Geier*, the decision to leave options open to bus manufacturers was made with specific policy objectives in mind. Hurley's suit, if successful, would undermine

> that policy objective and is therefore pre-empted.

Id. at 382. Thus, the court continued, "*Geier* confirms . . . that a state lawsuit that forecloses an option left open by FMVSS 208 is in fact preempted." *Id.* "We conclude that the Supreme Court's opinion in *Geier* governs Hurley's case and compels the conclusion that when a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suits that depends on foreclosing one or more those options is preempted." *Id.* at 383.

Similarly, *Griffith v. General Motors Corp.* (11th Cir. 2002) 303 F.3d 1276, *cert. den.* (2003) 538 U.S. 1023, held that *Geier* and FMVSS 208 preempted a claim that would impose liability for using a two-point belt rather than a three-point belt. FMVSS 208 allowed GM the option to install either a two-point lap belt or a three-point lap/shoulder belt for plaintiffs seating position. *Id.* at 1278. GM had chosen the lap belt. *Id.* Plaintiffs claimed that the vehicle was "defective because of the lap belt only design" for plaintiffs position. *Id.* at 1278-79. The Eleventh Circuit held that the claim was preempted because it would take away the FMVSS 208 option to use a lap-only belt, and require the manufacturer to use the lap/shoulder combination belt instead. FMVSS 208 "does not mandate any particular type of restraint, but rather requires manufacturers to choose from several specific options in installing a restraint system in their passenger cars and trucks." *Id.* at 1279. Under FMVSS 208, General Motors was

"free to install . . . either a lap belt for pelvic restraint or a shoulder/lap belt combination system." Id. "If successful, [plaintiff's] suit would foreclose an option specifically permitted by FMVSS 208. Therefore, it conflicts with that federal law and is impliedly preempted." *Id.* at 1282.

Still again, the Massachusetts Court of Appeals held that FMVSS 208 preempted based on failure to use a lap/shoulder belt combination in *Heinricher v. Volvo Car Corp.* (Mass. App. 2004) 809 N.E.2d 1094. Plaintiff there was "wearing a two-point lap belt" and riding in the rear seat of a Volvo sedan. *Id.* at 1095. The plaintiff sued in negligence and breach of warranty, asserting that the vehicle "was defective because it lacked a three-point lap-shoulder harness in the rear center seat" that he occupied. *Id.* Following *Geier*, *Griffith*, and *Hurley*, the court held that FMVSS 208 "plainly provided Volvo . . . with the option of installing *either* a two-point lap belt *or* a three-point lap-shoulder harness in the rear center seat of its vehicles." *Id.* at 1098. Plaintiffs' action "would hold the defendants liable for choosing one Federally-approved passenger restraint system over another." *Id.* That "would conflict with and stand as an obstacle to the implementation of the comprehensive safety scheme promulgated in Standard 208," so plaintiffs' claims "are preempted as a matter of law." 809 N.E.2d at 1098.

This case is the same. FMVSS 208 granted MC the option to use a lap-only belt or a lap/shoulder belt combination. Mazda chose to use the lap-only belt.

Plaintiff seeks to impose a duty to use the lap/shoulder belt. That is the exact claim held preempted by *Hurley*, *Griffith* and *Heinricher*, and takes away the federally-granted option just as in *Geier*. It is accordingly preempted.

4. CONCLUSION

Based upon the foregoing and under the doctrine of preemption and this Court's prior ruling, this Court should sustain MC's and MNAO's Demurrer to the Third Amended Complaint as it relates to the claims arising out of the death of Thanh Williamson without leave to amend.

DATED: August 22, 2006

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson,

Plaintiffs,

vs.

MAZDA MOTOR OF AMERICA, Inc., a California corporation; FORD MOTOR COMPANY, a Delaware corporation; AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive,

Defendants.

CASE NO. 04CC06494

Assigned:
Hon. Michael Brenner
Department: C20

[PROPOSED] ORDER RE MOTION TO STRIKE PORTIONS OF PLAINTIFF'S THIRD AMENDED COMPLAINT

Date: 9/19/06
Time: 1:30 p.m.
Dept.: C20

Action Filed:	**7/07/04**
Trial Date:	**8/07/06**
Motion Cutoff:	**7/23/06**
Discovery Cutoff:	**7/08/06**

GOOD CAUSE having been shown therefore, it is the order of this court that Defendants MAZDA MOTOR CORPORATION and MAZDA MOTOR OF AMERICA, INC. dba MAZDA NORTH AMERICAN OPERATIONS' Motion to Strike Portions of Plaintiffs' Third Amended Complaint is hereby approved.

IT IS SO ORDERED.

DATED: _____, 2006

_____
JUDGE OF THE
SUPERIOR COURT

[Proof Of Service And Service List
Omitted In Printing]

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, INC., FORD MOTOR COMPANY,	**CASE NO. 04CC06494** Hon. Michael Brenner (Dept. C-20) **PLAINTIFFS' OPPOSITION TO MAZDA MOTOR CORPORATION'S DEMURRER AND MOTION TO STRIKE THE THIRD AMENDED COMPLAINT** (Filed Sep. 13, 2006)

AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, and DOES 1-100, inclusive, Defendants.	[Filed concurrently with Plaintiffs' Request for Judicial Notice] DATE: September 26, 2006 TIME: 1:30 P.M. DEPT.: C-20 Complaint filed: July 7, 2004 Trial date: November 7, 2006

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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

Mazda Motor Corporation's ("MAZDA") demurrer and motion to strike rest on a complete misunderstanding of the allegations of the Third Amended Complaint: MAZDA asserts that the design defect claims concerning the rear center seat's lap-only belt are identical to those alleged in the Second Amended Complaint and are therefore preempted by federal law based on the court's prior ruling. This is not accurate.

The Third Amended Complaint no longer relies on the allegation that MAZDA should have utilized a lap-shoulder belt rather than a lap-only belt, but now alleges that the vehicle's lap-only belt is itself defective "because it did not restrain the upper torso of decedent Thanh Williamson, it did not prevent the body of decedent Thanh Williamson from 'jackknifing' around the lap-only belt, and it was anchored at an unsafe angle to the SUBJECT VEHICLE." (TAC ¶ 29(a).) The Third Amended Complaint also alleges that Thanh Williamson's death was caused by *several defects* in the lap-only belt, seat bottom, seat back, and vehicle's structure (Third Amended Complaint ["TAC"] ¶ 29(a)-(d).) and asserts that these defects "were joint and concurrent causes of Plaintiff's injuries, such that each defect and failure cannot be evaluated and adjudicated separately but must be evaluated and adjudicated together.." (TAC ¶ 31.)

These allegations concerning the design defects of the lap only belt and other components utilized in this particular vehicle cannot fall under the Court's prior order or be preempted by federal law because *they do not rest on MAZDA's failure to utilize the lap-shoulder seat belt* – they are independent claims arising out of MAZDA's failure to property [sic] design three separate features of the lap-only belt, as well as other components of the vehicle. No state or federal court has ever held that state common law claims attacking the design of a restraint system, rather than the manufacturer's choice of one restraint system over another, are preempted by federal law.

In addition, MAZDA contends that Plaintiffs' failure to warn claim concerning the lap-only belt is preempted because their design defect claims are preempted. As a matter of logic, since Plaintiffs' design defect claims are not preempted, their failure to warn claims cannot be preempted. Nevertheless, even if this Court were to find that Plaintiffs' design defect claims are preempted, their failure to warn claims still cannot be preempted because those claims are independent of their design defect claims. See *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1110-1113; *Finn v. G.D. Searle & Co.* (1984) 35 Cal.3d 691, 699 (the jury "'must decide whether a product flawlessly designed and produced may nevertheless possess such risks to the user without a suitable warning that it becomes "defective" simply by the absence of warning.'").

Accordingly, MAZDA's demurrer and motion to strike must be denied.

II. SUMMARY OF FACTS

On or about August 14, 2002, Plaintiffs Delbert Williamson, Alexa Williamson, and the decedent Thanh Williamson, represented through her Estate ("PLAINTIFFS"), were injured while they were traveling in their 1993 Mazda MPV Minivan when it was struck head-on by a 1998 Jeep Wrangler that had crossed the center divider line of a highway, after having become detached from a motor home being driven by Jack W. Bonzelaar. (Third Amended Complaint ["TAC"] ¶ 1.)

All passengers in the Williamsons' 1993 Mazda MPV Minivan wore seat belts. Thanh Williamson, however, was killed when the forces generated by this collision and the defective and uncrashworthy design of the MPV caused her body to "jackknife" around her defective lap belt, causing severe abdominal injuries and internal bleeding. Her husband and daughter, Delbert and Alexa Williamson, were also injured in the accident due to the defective and uncrashworthy design of the MPV. (TAC ¶ 2.)

The Third Amended Complaint alleges the following defects in the vehicle:

a. The center seating position of the middle bench seat was equipped with an inferior and unsafe lap-only belt that did not provide adequate protection in frontal collisions

because it did not restrain the upper torso of decedent Thanh Williamson, it did not prevent the body of decedent Thanh Williamson from "jackknifing" around the lap-only belt, and it was anchored at an unsafe angle to the SUBJECT VEHICLE;

b. The angle, geometry, and composition of the seat bottom of the center and driver's side seating positions of the middle bench seat were inferior and unsafe in that they were unreasonably susceptible to ramping and submarining of passengers seated in those positions in frontal collisions;

c. The seat backs of the center and driver's side seating positions of the middle bench seat were inferior and unsafe in that they did not sufficiently withstand foreseeable forces in a frontal collision and folded forward causing Thanh and Alexa's upper torsos to further lean forward;

d. The entire vehicle did not contain sufficient energy-absorbing materials and structures to absorb reasonable amounts of force from a frontal collision, such that it was not reasonably crashworthy;

e. The front driver's side seating area lacked sufficient survival space, such that in a frontal collision, the driver's seat is dangerously compromised.

(TAC ¶ 29(a) (e).)

The Third Amended Complaint also alleges that MAZDA failed to adequately warn and instruct PLAINTIFFS and other consumers about the hazards, risks, and dangers of the above defects (TAC ¶ 30(a).) These defects and failures to warn were joint and concurrent causes of PLAINTIFFS' injuries, such that each defect and failure cannot be evaluated and adjudicated separately but must be evaluated and adjudicated together. (TAC ¶ 31.) For example, the injuries to Thanh Williamson were the result of all of the defects alleged in paragraph 29, subsections (a)-(d), each defect acting in tandem to cause her severe abdominal injuries. (TAC ¶ 31.) But for the presence of all of these defects, Thanh Williamson's injuries would not have been as severe nor would she have died from her injuries. (TAC ¶ 31.)

III. MAZDA INCORRECTLY ASSERTS PLAINTIFFS DO NOT HAVE LEAVE TO ALLEGE THE CLAIMS ASSERTED IN THE THIRD AMENDED COMPLAINT BECAUSE PLAINTIFFS WERE GIVEN LEAVE TO ALLEGE OTHER BASES OF LIABILITY FOR THANH WILLIAMSON'S DEATH

In its motion to strike, MAZDA incorrectly contends that Plaintiffs "lack permission" to assert the claims alleged in the Third Amended Complaint. To the contrary, Plaintiffs were given leave to amend to allege *other bases of liability* for Thanh Williamson's death. As the Court stated:

> "So my inclination is to grant them leave to file a third amended complaint, which I understand maybe doesn't add new theories, it is just more or less flushing out the idea that there were *other* simulataneously [sic] – *simultaneous causes or basis of liability* to the decedent's death. So I am going to allow the filing of a third amended complaint."

Reporter's Transcript of July 6, 2006 Hearing, [Mazda Motion, Exhibit "A"], p. 10, lines 18-25 (emphasis added).

As discussed in detail below, Plaintiffs have alleged other bases of liability that are independent of MAZDA's failure to install a lap-shoulder belt in the rear center seat of the subject vehicle.

VI. PLAINTIFF'S CLAIMS REGARDING THE DEFECTS IN THE LAP-ONLY SEAT BELT, SEAT BOTTOM, SEAT BACK AND VEHICLE'S STRUCTURE ARE NOT SUBJECT TO FEDERAL PREEMPTION BECAUSE THEY DO NOT REST ON MAZDA'S FAILURE TO EMPLOY A LAP-SHOULDER SEAT BELT.

The Third Amended Complaint alleges that the subject vehicle was defective due to several defects in the lap-only belt, seat bottom, seat back, and vehicle's structure (TAC ¶ 29(a)-(d).) and asserts that these defects "were joint and concurrent causes of Plaintiff's injuries, such that each defect and failure cannot be evaluated and adjudicated separately but must be

evaluated and adjudicated together. For example, the injuries to Thanh Williamson were the result of all of the defects alleged in paragraph 29, subsections (a)-(d), each defect acting in tandem to cause her severe abdominal injuries." (TAC ¶ 31.)

Contrary to MAZDA's misunderstanding, Plaintiffs have not merely reasserted a "failure to utilize a lap-shoulder belt" claim, but are now alleging that the vehicle's lap-only belt is itself defective "because it did not restrain the upper torso of decedent Thanh Williamson, it did not prevent the body of decedent Thanh Williamson from 'jackknifing' around the lap-only belt, and it was anchored at an unsafe angle to the SUBJECT VEHICLE." (TAC ¶ 29(a).). These allegations concerning the design defects of the lap-only belt and other components utilized in this particular vehicle cannot fall under the Court's prior order or be preempted by federal law because *they do not rest on MAZDA's failure to utilize the lap-shoulder seat belt* – they are independent claims arising out of MAZDA's failure to property [sic] design three separate features of the lap-only belt, as well as other components of the vehicle. No state or federal jurisdiction has ever held that state common law claims attacking the design of a restraint system, rather than the manufacturer's choice of one restraint system over another, are preempted by federal law.

To hold otherwise would contravene the holding of the United States Supreme Court's decision in *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861 and its progeny. See *Geier, supra*, 529 U.S. at

885 ("It is possible that some special design-related circumstance concerning a particular kind of car might require airbags, rather than automatic belts, and that a suit seeking to impose that requirement could escape pre-emption – say, because it would affect so few cars that its rule of law would not create a legal 'obstacle' to [FMVSS] 208's mixed-fleet, gradual objective."); *Sprietsma v. Mercury Marine* (2002) 537 U.S. 51 (federal agency's decision to not require a particular safety feature based on economic considerations and the lack of a "universal" technical solution suitable for use on all vehicles does not have any preemptive effect.); *Carrasquilla v. Mazda Motor Corp.*, (M.D. Pa. 2001) 166 F.Supp.2d 169, 179 (plaintiff's claim relating to the manner in which Mazda implemented its design choice, specifically claims relating to Mazda's liability for not providing an adequate seat back, seat track, and knee bolsters, were not preempted); *Volkswagen of America, Inc. v. Gentry*, (Ga. App. 2002) 564 S.E.2d 733, 737 (plaintiffs' claims not preempted when plaintiffs' alleged that the passive restraint system chosen by manufacturer was defective in design). As the court in *Chevere v. Hyundai Motor Co.*, (N.Y.App. 2004) 774 N.Y.2d 6, 7, explained:

> "*Geier* does not automatically exempt automobile manufacturers from liability whenever a federal regulation provides them with options as to the type of restraint system to be employed. Nothing in [*Geier*] bars allegations of strict products liability, breach of warranty and negligence in a state action.

> *Geier* precludes actions alleging a general failure to equip a vehicle properly, but does not preclude common-law claims against a manufacturer who has unreasonably opted to meet only minimum performance requirements."

The claims asserted by Plaintiffs here, unlike those in *Geier*, would not require MAZDA to install an alternative restraint system that is optional under FMVSS 208, but merely requires MAZDA to ensure that the restraint systems it uses, in this case consisting of the lap-only belt, seat bottom, seat back, and vehicle's structure, are free of defects and safe for consumers. This difference is critical because *FMVSS 208 is a safety standard, not a design standard.* 49 U.S.C. 30101 (purpose of FMVSS are "(1) to prescribe motor vehicle safety standards for motor vehicles and motor vehicle equipment in interstate commerce; and (2) to carry out needed safety research and development."). To employ it as a design standard, as MAZDA urges, would immunize every automobile manufacturer from having to meet its common law duty of care to design a safe vehicle simply because an FMVSS gives them a choice of alternative safety devices. That would be directly contrary to the safety clause of the Federal Motor Vehicle Safety Act and the holdings in *Geier* and its progeny. See 15 U.S.C. § 1397(k) ("[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."); *Geier, supra,* 529 U.S. at 870 (savings clause evidences Congress' intent to "preserve"

common law tort claims "that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor.").

In short, Plaintiffs' design defect claims are not preempted under *Geier* and its progeny because Plaintiffs are not attacking MAZDA's choice of a lap-only seat belt, but rather MAZDA's execution, implementation and design of the restraint systems utilized in the subject vehicle. See *King v. Ford Motor Company* (6th Cir. 2000) 209 F.3d 886, 892 (claims attacking the execution, implementation, and design of a passive restraint system are not preempted).

V. PLAINTIFFS' CLAIMS REGARDING THE DEFECTS IN THE LAP-ONLY SEAT BELT ARE EXPRESSLY EXEMPTED FROM PREEMPTION BY THE SAVINGS CLAUSE OF THE FEDERAL MOTOR VEHICLE SAFETY ACT.

A. Legal Standard Governing Federal Preemption.

As the U.S. Supreme Court has instructed, a party arguing for preemption of state law bears a heavy burden of overcoming the long-standing presumption that "Congress does not cavalierly preempt state-law causes of action." *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485. This burden is especially heavy where, as here, preemption would displace the historic power of the states to protect the health and safety of their citizens. *Id.* at 485. This presumption

applies equally to claims of express or implied preemption. *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 958, fn. 11. Where preemption of common-law claims would leave injured individuals without any state or federal remedy, which is the result sought by MAZDA here, a court may find preemption only in the most compelling circumstances. See *English v. General Electric Corp.*, 496 U.S. 72, 87-90; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)

B. Background of Federal Motor Vehicle Safety Standards

In 1996, Congress passed the National Traffic and Motor Vehicle Safety Act of 1996, 15 U.S.C. §§ 1381-1431 (the "Safety Act"), "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. To achieve that goal, Congress empowered the federal Department of Transportation to issue minimum safety standards for motor vehicle performance. See 15 U.S.C. §§ 1391(2), 1392(a). The Department, in turn, delegated this duty to the National Highway Transportation Safety Administration ("NHTSA"). See 49 C.F.R. § 501.2. NHTSA fulfilled its responsibility by promulgating the Federal Motor Vehicle Safety Standards ("FMVSS") published at 49 C.F.R. §§ 571.1-.302. The FMVSS are *minimum* standards that a vehicle must meet in order to be sold in the United States.

Most of the FMVSS are "performance" standards, which set forth how a vehicle must perform under certain circumstances. The most recognizable example of a performance standard is the crash testing section of FMVSS 208, which specifies the maximum injury criteria levels for crash test dummies in particular types of barrier impacts. The FMVSS also contain "design" standards, which dictate the parameters of how certain components are actually designed or placed in the vehicle. One example of a design standard is FMVSS 210, which dictates certain zones in which seat belt anchors must be installed.

The Safety Act also includes a "savings" clause that provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). In *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861, the U.S. Supreme Court construed this clause as evidencing Congress' intent to "preserve" common law tort claims "that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." *Id.* at 870.

C. The History of the Rear Center Seat Option of FMVSS 208.

At the time the MAZDA MPV at issue was manufactured, FMVSS permitted auto manufacturers to install either two-point lap belts (a "Type 1" system) or three-point lap/shoulder belts (a "Type 2" system)

in the rear-center seats of their cars. See 49 C.F.R. § 571.208 S.4.1.4.2. (1990). Since MAZDA's motion rests on this version of FMVSS 208, it is important to understand its evolution in some detail.

The relevant version of FMVSS 208 first took effect in 1968, when NHTSA passed its initial set of motor vehicle safety standards. See 32 Fed. Reg. 2408 (February 3, 1967). At that time, FMVSS 208 required the installation of lap/shoulder belts at the drivers' and right-front passengers' seating positions, and either lap belts or lap/shoulder belts at every other designated seating position (i.e. the center front seat and all rear seats). *Id.* at 2415. In the preamble accompanying the final rule, NHTSA characterized this rule as a "minimum safety standard" within the meaning of the Safety Act. 32 Fed. Reg. at 2408. The regulatory preamble contained no further explanation or statement of policy with respect to the agency's decision to give car makers the option of installing either lap belts or lap/shoulder belts in rear seating positions. *See id.*

In 1986, the National Transportation Safety Board ("NTSB") issued a Safety Recommendation with respect to lap/shoulder belts. (TAC ¶ 22.) Among other things, the NTSB concluded that "[l]ap/shoulder belts provide superior crash protection to that of lap belts alone, and present a significantly lesser risk of induced injury. . . ." (TAC ¶ 22.) The NTSB further observed that "such systems appear to work effectively even for children, and they can be used with child safety seats and booster seats." (TAC ¶ 22.) The

NTSB ultimately recommended that, "[g]iven the known deficiencies of lap-only belt systems and the superior crash protection offered by belt systems that incorporate an upper torso restraint, the Safety Board believes that government and industry should take a number of steps to reduce reliance on lap belts and increase the availability of lap/shoulder belt systems." (TAC ¶ 22.) With respect to the industry, the NTSB recommended that "early action . . . be taken to provide aftermarket retrofit assemblies to convert lap/only belts to lap/shoulder belts." (TAC ¶ 22.) The NTSB further found that such "retrofit assemblies" may be technically feasible "at very [sic] seating location," including rear-center seats. (TAC ¶ 22.) With respect to new cars, the NTSB recommended that all rear seats – including rear center seats – be equipped with lap-shoulder belts. (TAC ¶ 22.)

In 1988, NHTSA proposed to amend FMVSS 208 to require lap/shoulder belts in all rear outboard seating positions of passenger cars. See 53 Fed. Reg. 47982 (November 29, 1988). In its Notice of Proposed Rulemaking, NHTSA stated that it had decided not to propose a rear-center seat requirement based on manufacturers' complaints that the costs of installing lap/shoulder belts in rear-center seats might exceed the anticipated safety benefits. See *id.* at 47984. At no point did NHTSA state that lap/shoulder belts would be unsafe in rear-center seats, or that it affirmatively sought to give car makers the unfettered choice between installing lap belts or lap/shoulder belts in that seating position. To the contrary, it emphasized that

"[r]ear seat lap/shoulder belts are estimated to be more effective than rear seat lap belts in reducing fatalities and moderate-to-severe injuries." *Id.* at 47982.

In 1989, NHTSA published a final rule requiring lap/shoulder belts in all rear-outboard seats, but retaining the regulatory option with respect to rear-center seats. See 54 Fed. Reg. 25275 (June 14, 1989). The regulatory preamble once again emphasized that "NHTSA believes that lap/shoulder belts would be more effective than lap-only belts in rear seating positions." *Id.*

In June 1999, NHTSA published a study on the relative safety advantages of lap belts and lap/shoulder belts in the rear seats of cars. (TAC ¶ 25.) Among other things, the study compared the fatality risk for lap/shoulder belted occupants to the risk for lap-belted occupants. NHTSA's principal conclusion was that "[t]he change from lap to lap/shoulder belts [in rear outboard seats] *has significantly enhanced occupant protection, especially in frontal crashes.*" (TAC ¶ 25.) NHTSA added that:

> In all crashes, lap/shoulder belts are 15 percent more effective than lap belts alone. In frontal crashes, lap/shoulder belts are 25 percent more effective than lap belts alone. . . . Lap/shoulder belts reduce the risk of both head and abdominal injuries in potentially fatal front crashes relative to lap belts only: head injuries by 47 percent and abdominal injuries by 52 percent.

(TAC ¶ 25.)

In December 2002, President Bush signed into law a bill known as "Anton's Law," which provides for the improvement of child safety devices when installed in motor vehicles. See Pub. Law No. 107-318. One of the provisions of Anton's Law concerns the installation of lap/shoulder belts in rear-center seating positions. Specifically, Section 5(a) of the law directs NHTSA to amend FMVSS 208 to require lap/shoulder belts in rear-center seats by no later than December 2004.

Compelled by this statutory directive, on August 2003, NHTSA published a proposal to require lap/shoulder belts in all rear-center seats. 68 Fed. Reg. 46546 (August 2, 2003). At the time, NHTSA stated that Anton's Law is "fully consistent with the agency's preexisting plan to initiate rulemaking" to require lap/shoulder belts in rear-center seats. *Id.* at 46547. In its notice of proposed rulemaking, NHTSA once again emphasized the special safety benefits of lap/shoulder belts for children, stating that "one of the primary reasons for today's proposal is the increased protection that children between the ages of four and eight gain by having a lap/shoulder belt made available in rear center seating positions. When these lap/shoulder belts are installed in the rear center seating position, there will be an additional, and potentially safer, seating position available for a child in a belt-positioning booster seats." *Id.* at 46548. NHTSA further emphasized that requiring lap/shoulder belts in rear-center seats would not just benefit children: [i]t would also benefit older occupants." *Id.*

D. Geier v. American Honda

Relying on *Geier v. American Honda Motor Co., Inc.* (2.000) 529 U.S. 861, MAZDA contends that all of PLAINTIFFS' claims arising out of the death of Thanh Williamson are preempted by federal law. *Geier,* however, is not applicable here.

Geier involved a "no airbag" claim. The plaintiff alleged that her injuries were exacerbated by the fact that her vehicle – a 1987 Honda Accord – lacked a driver's side airbag. *Id.* at 865. Plaintiff asserted that Honda had designed the car negligently and defectively by failing to equip the car with a driver's side airbag. *Id.*

Honda argued that this no airbag claim was preempted by the Safety Act, and in particular, FMVSS 208. Honda cited the portion of FMVSS 208 that required car manufacturers to "phase in" passive restraint requirements beginning in model year 1987. According to the court, there were two important prongs to this phase in requirement. First, the requirements allowed manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic seatbelts, etc. *Id.* at 878. Second, NHTSA implemented a gradual phase in of the passive restraints, requiring them on only 10 percent of 1987 models and increasing the percentage until it reached 100 percent for the 1990 model year. *Id.* at 879.

The court was also sensitive to some of NHTSA's concerns that led it to create the phase in scheme as

opposed to requiring a specific type of system on all cars. Those concerns included the fact that since passive restraints were relatively new to the marketplace, it was not known how the public would react to the various systems, and NHTSA wanted to allow manufacturers time to experiment with a variety of systems in order to find the best ones. *Id.* at 877-79. Honda argued that the plaintiff's no airbag claim conflicted with this passive restraint phase in scheme and was therefore preempted by. FMVSS 208.

First and most significantly, *the Supreme Court unanimously found that the Safety Act did not expressly preempt the plaintiff's claim. Id.* at 868. Honda had urged express preemption under the Safety Act's preemption provision. 15 U.S.C. § 1392(d). The Court, however, rejected this argument, relying on the Safety Act's "savings clause," which states: "Compliance with any [FMVSS] shall not exempt any person from any liability under common law." 15 U.S.C. § 1397(k), *Geier, supra,* 529 U.S. at 867-68. This language, the Court held, was specifically intended to "leav[e] adequate room for state tort law to operate – for example, where federal law creates only a floor, i.e., *a minimum safety standard." Id.* at 868 (emphasis added). Thus, under *Geier,* if a federal safety standard constitutes a floor or minimum standard, conflict preemption will ordinarily not apply because the Safety Act's savings clause "preserves those actions that seek to establish greater safety than the minimum safety achieved by

a federal regulation intended to provide a floor." 529 U.S. at 871.

This holding is critical because it made clear that the vast majority of automotive defect cases are not preempted because most FMVSS's create "only a floor, i.e., a minimum safety standard." *Id.* at 868. This holding is consistent with the Supreme Court's subsequent interpretation of other federal statutes with similar preemption provisions. See *Bates v. Dow Agrosciences LLC,* (2005) 544 U.S. 431 (plaintiffs claims against manufacturer of pesticide are not preempted by the labeling provision of Federal Insecticide, Fungicide, and Rodenticide Act because of its savings clause); *Sprietsma v. Mercury Marine,* (2002) 537 U.S. 51 (plaintiff's state common law claims against manufacturer of outboard motors were neither expressly nor impliedly preempted the Federal Boat Safety Act because the savings clause of the FBSA specifically preserved liability under state common law).

In spite of the savings clause, a five-member majority of the Supreme Court decided to apply implied preemption principles to the Safety Act, and the FMVSS. *Geier, supra,* 529 U.S. at 874. The Court held that if a tort claim "actually conflicts" with the FMVSS, then it is preempted. *Id.* A claim actually conflicts when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 873. Applying these principles, the court found that the plaintiff's no

airbag claim actually conflicted with FMVSS 208. *Id.* at 874.

In short, the basis on which the Court found preemption was extremely narrow. Specifically, the Court found a conflict with FMVSS 208 based on the detailed NHTSA policy behind the passive restraint phase-in scheme. According to the Court, plaintiff's no airbag claim aimed at the 1987 Accord was the equivalent of requiring all 1987 model year vehicles to be equipped with an airbag. *Id.* at 881. The Court was concerned that such an "all airbag" rule in 1987 would have "presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* The Court had noted that NHTSA wanted this variety to "help develop data on comparative effectiveness" and to "facilitate the development of alternative, cheaper, and safer passive restraint systems." *Id.* at 862.

Thus, in all preemption motions relying on *Geier*, the focus must be on this narrow predicate of the court's ruling. The Court did not find that tort claims are preempted merely because there is a FMVSS covering the component at issue or providing options to manufacturers. The Court limited its holding to those cases where the claim would actually conflict with the stated purpose and goals of NHTSA.

E. The U.S. Government has consistently taken the position that simply because FMVSS 208 gives manufacturers the option of choosing different restraint systems does not mean that state common law claims are preempted.

Geier's holding and approach is in accordance with the consistent position of the United States that regulatory options do not, in and of themselves, exert preemptive effect. In *Geier,* the Supreme Court gave "special weight" to the position that NHTSA had taken "consistently over time" in a series of amicus briefs filed with the Court in three different cases – *Wood v. General Motors Corp.*, (1st Cir. 1988) 865 F.2d 395, *cert. denied,* (1990) 494 U.S. 1065; *Freightliner Corp. v. Myrick,* (1995) 514 U.S. 280; and *Geier, supra,* 529 U.S. at 883, 885. See Request for Judicial Notice, Exhibits "A", "B", and "C." In those very briefs, NHTSA specifically rejected the broad "options" argument advanced by MAZDA here.

Thus, in an Amicus Curiae Brief filed by the United States in opposition to the grant of *certiorari* in *Wood,* which presented the same question that the Court ultimately answered in *Geier,* the federal government stated:

> *Respondent argues that FMVSS 208 preempts state tort claims because that standard has always allowed manufacturers to use various types of occupant restraints. We disagree with this reasoning.* Nothing in the Safety Act or FMVSS 208 confers on car

> makers a "right" to comply with the federal standards without tort liability, and [the Safety Act's savings clause] proves that Congress did not grant any such immunity. *That state tort law may compel an auto maker as a practical matter to choose one of the options authorized by federal law also does not necessarily establish an actual conflict between federal and state law.* Federal standards are "minimum standard[s]," 15 U.S.C. 1391 (2), permitting manufacturers to use any design that satisfies federal requirements. If any design "permitted" in this sense could not be the subject of a common-law design defect claim, manufacturers would obtain by implication what Congress expressly denied them in [the Safety Act's savings clause]: immunity from common law liability by complying with minimum federal standards. That result would be contrary to Congress's statutory design, which was to supplant direct state regulation of vehicle design, but to leave the common law intact absent an actual conflict with federal standards. *Thus, the mere fact that manufacturers may comply with federal law by installing one of several types of occupant restraint systems does not mean, standing alone, that a state law tort action seeking to impose liability for failing to install airbags is preempted.*

Request for Judicial Notice, Exhibit "A" at 7-8 (citations omitted; emphasis added).

Similarly, in the Amicus Curiae Brief of the United States in *Freightliner,* the federal government noted that, "[a]lthough the majority of courts to have considered the question have concluded that 'no-airbag' suits are preempted, they have done so on a broader theory of implied preemption *with which the United States does not agree,* i.e., that the existence of 'options' to comply with Standard 208 in itself precludes state-court judgments based on the failure to install one particular option." Request for Judicial Notice, Exhibit "B" at pp. 28-29 n.16 (emphasis added).

Finally, in the Amicus Curiae Brief of the United States in *Geier,* the federal government argued that "state tort law does not conflict with a federal 'minimum standard'. . . . merely because state law imposes a more stringent requirement." Request for Judicial Notice, Exhibit "C" at p. 21. Based on this argument, the United States went on to state:

> *We therefore agree with petitioners that their claims are not preempted merely because the Secretary made airbags one of several design options that manufacturers could choose.* We disagree, however, with the contention that the Secretary provided options because she had no statutory authorization to do otherwise. The Secretary could have imposed performance requirements that effectively required an airbag design. As we explain at pages 23-26, *infra,* the Secretary chose not to do so in order to encourage the provision of a variety of passive restraints, because she

> determined that would best promote safety. Petitioners' claims are preempted because they would frustrate that policy judgment.

Id. at 21 n.18 (citations omitted; emphasis added). It was precisely this reasoning – i.e., that common-law no-airbag claims are preempted because they would "frustrate" NHTSA's special policy goals, *not* because Standard 208 created regulatory options – that the Supreme Court adopted in *Geier*. See *Geier, supra*, 529 U.S. at 883.

In short, the federal government itself has long been of the view that the mere existence of regulatory options is insufficient to preempt common-law claims. This view, moreover, is entitled to great deference from this Court. See *Geier, supra*, 529 U.S. at 883, 886 (federal government's position on the preemptive effect of Standard 208 is entitled to "special weight"); *Sprietsma, supra*, 537 U.S. at 68 (deferring to United States' view that decision by the United States Coast Guard not to require propeller guards on motor boat engines does not preempt common-law nopropeller-guard claims).

F. California and the Ninth Circuit have upheld the broad scope of the savings clause and have narrowly interpreted *Geier* against preemption.

There are currently no published California State or Ninth Circuit cases applying *Geier* to an automotive defect case. However, when *Geier* was before

the United States Supreme Court, the State of California, along with 16 other states, filed an Amicus Brief in which it clearly stated its position that (1) the savings clause of the Federal Motor Vehicle Safety Act is essentially an "anti-preemption provision" which excludes claims of design defect from federal preemption, (2) in light of the clear language of the savings clause, the Court should not apply implied conflict preemption, and (3) the purpose of the Safety Act is to prevent injury, whereas the purpose of state common law is to redress injury, so the Safety Act should not be interpreted to supercede the traditional role of state common law. See *Brief Amici Curiae of the States of Missouri, Arizona, California, etc. in Geier v. American Honda Motor Co.*, [Request for Judicial Notice, Exhibit "D"] at pp. 6, 12, 13, 16.

In addition, the Ninth Circuit and district courts have distinguished *Geier* in other contexts. Shortly after *Geier* was decided, the Ninth Circuit applied it in a non-auto context. In *Leipart v. Guardian Industries* (9th Cir. 2000) 234 F.3d 1063, the plaintiff alleged he was injured due to defects in a shower door that caused it to break into long, dangerous shards rather than into small, relatively harmless pieces. *Id.* at 1065-66. The defendant argued such claims were preempted by the federal Consumer Product Safety Act ("CPSA"). Like the auto Safety Act, the CPSA calls for the promulgation of standards similar to the FMVSS, and one of those standards specifically addresses the manner in which shower doors must break if subjected to a certain force. *Id.* at 1066. The

CPSA also contains an express preemption clause and savings clause almost identical to the auto Safety Act. *Id.* at 1066-67.

Like *Geier,* the *Leipart* court first held that the CPSA did not expressly preempt the plaintiff's claims. *Id.* at 1069. The court then went on to distinguish *Geier* and hold that the CPSA also did not impliedly preempt, the claims. *Id.* at 1069-70. In doing so, the court cited to the fact that *Geier* relied upon NHTSA's stated policies behind the phase-in provisions of FMVSS 208. *Id.* at 1069. The CPSA is different because it merely created a "floor" or minimum standard above which state law could impose further duties. *Id.* at 1070.

Similarly, in *Oxygenated Fuels Ass'n v. Davis,* 331 F.3d 665, 672 (9th Cir., 2003), the Ninth Circuit distinguished *Geier* in the context of a case implicating the Clean Air Act:

> "Geier is distinguishable from this case on two grounds. First, in Geier, the relevant regulating agency, in interpreting its own governing statute, had decided that the suit was preempted, and the Supreme Court gave deference to the agency's determination. See id. at 883-84. Here the EPA has made no such determination. Second, the Supreme Court in Geier found abundant evidence in the administrative history of the FMVSS to indicate that it was intended to give auto manufacturers a choice of safety restraints. See id. at 875-83. We can find no evidence

> that the Clean Air Act was intended to give gasoline producers a comparable choice of oxygenates. Indeed, we have already specifically held in Exxon Mobil that HN16the [sic] legislative history of the Clean Air Act does not support a conclusion that Congress meant to give gasoline producers an unconstrained choice of oxygenates. For these reasons, several courts have already rejected Geier-based preemption challenges to MTBE regulations."

The Northern District of California has also properly applied a narrow reading of *Geier* in two decisions denying motions to dismiss automobile class actions. See *Kent v. DaimlerChrysler Corp.* (N.D. Cal. 2002) 200 F.Supp.2d 1208, 1210; *Chamberlain v. Ford Motor Company,* (N.D. Cal. 2004) 314 F. Supp. 2d 953..

In *Kent,* the plaintiffs brought a class action alleging that certain model year Jeep Grand Cherokees have a design defect, which causes them to self-shift from park to reverse. *Kent, supra*, 200 F.Supp. at 1210. DaimlerChrysler argued that plaintiffs' claims were preempted by FMVSS 102, which addresses transmission issues. The court, citing *Geier,* rejected that argument. It noted the *Geier* court's reliance on the history of FMVSS 208 and NHTSA's stated desire to encourage a mix of passive restraipnt systems. *Kent, supra,* 200 F.Supp. at 1215. By contrast, the court found no such policy rationale in FMVSS 102. *Id.* at 1216.

Likewise, in *Chamberlain,* the court engaged in a proper interpretation of *Geier* and denied Ford's motion to dismiss a class action complaint. The court found that *Geier's* preemption holding was based on the history of FMVSS 208 and that "the Department of Transportation's carefully considered policy decision to allow gradual introduction of safety devices better to meet safety needs and accommodate manufacturers and the public." *Chamberlain, supra,* 314 F. Supp. 2d at 963. Like *Kent,* the court found no such "considered choice" at issue in that case. *Id.* ("*Geier* is distinguishable because there is no substantive regulation at issue in the instant case nor is there language in the MVSA or its legislative history demonstrating that exclusive federal agency administration of injunctive remedies in the field of motor vehicle safety was the considered policy choice of Congress.")

These decisions demonstrate that that [sic] the Ninth Circuit and California acknowledge the limited scope of *Geier.* These courts recognize that the FMVSS do not preempt state tort claims that simply hold the manufacturers to higher standards than the bare minimum required by the FMVSS.

G. PLAINTIFFS' claims regarding the lack of a three-point seat belt are not impliedly preempted by FMVSS 208.

PLAINTIFFS' seat belt claims are not preempted here simply because PLAINTIFFS seek to hold

MAZDA to a higher standard than the minimum standard set forth in FMVSS 208. See *Leipart, supra,* 234 F.3d at 1070. Examples of FMVSS that establish minimum performance standards are those dealing with roof crush (FMVSS 216) and seat back strength (FMVSS 207). Some published cases provide additional examples.

In *Harris v. Great Dane Trailers* (8th Cir. 2000) 234 F.3d 398, the plaintiff alleged inadequate reflective tape on the back of a truck. FMVSS 108 governs reflective devices on the back of trucks. The court found no preemption because FMVSS 108 only set a minimum standard. *Id.* at 401-02. The court also found that the lack of specific tape configuration requirements did not preempt the claim because it did not constitute a federally granted "option" like the standard at issue in *Geier.* Rather, it simply "left the industry where it was before – free to make voluntary decisions" about safety devices. *Id.* at 402-03.

The mere existence of options in FMVSS 208 does not mean that a claim based on the choice of one of those options is preempted. The government took this position in its amicus brief for *Geier* by stating that even though FMVSS 125 gave manufacturers multiple options for the design of reflective devices on stopped vehicles, NHTSA did not determine that the availability of these options was necessary to promote safety. U.S. Brief, 1999 WL 1045115, at *21-22. In other words, the "options" at issue in that case were part of a unique phase-in scheme that sought a mix of systems. Absent such a specific regulatory history

promoting the mix of options, preemption cannot apply.

This is the lesson of *Geier* itself (which relied on a highly unusual regulatory history as the basis for its preemption holding, *not* on the fact that the regulation created various options) and of the United States' own consistent litigating position that mere regulatory options do not, in and of themselves, exert any preemptive effect. If the mere existence of regulatory options were sufficient to preempt tort claims, then *Geier* would not have even needed to address the complex policy reasons underlying the 1984 version of FMVSS 208; it would have been sufficient to point out that the car maker in that case (Honda) had chosen to install one of several permitted regulatory options, and that the chosen option did not require an airbag. *Geier,* however, never purported to rely on such an observation, making clear that regulatory options, standing alone, do not exert any preemption force under the Safety Act.

Contrary to MAZDA's assertion, there is no basis for concluding that this lawsuit would undermine some special federal policy with respect to rear-center seats. This case is inapposite from *Geier,* which involved a version of FMVSS 208 that required car manufacturers to install either airbags or some other form of passive restraint in the front seats of passenger cars. The accompanying regulatory preamble made clear that the reason the federal government gave car makers the choice of installing

various types of passive restraints was to ensure that car manufacturers installed a mix of different devices in the front seats of cars, in part to avoid a massive public backlash against airbags. Given this fear of airbags, NHTSA had the specific goal of ensuring that some cars include forms of passive restrains *other than* airbags. *Geier* held that, in light of this unique goal, a jury verdict holding a manufacturer liable for its failure to install an airbag would undermine federal policy by pushing car makers to install airbags in all their cars.

This federal policy has no application here. In contrast to the hotly-debated airbag, the lap/shoulder belt has always been required equipment in the front seats of passenger cars (and since 1989, in the rear outboard seats). Given this history, there is no basis for concluding that NHTSA affirmatively sought to induce manufacturers to build some number of cars that did not include lap/shoulder harnesses in the rear-center seats. And the regulatory history of the options standard at issue does not contain *a single reference* to the type of "technological diversity" goals at issue in *Geier*.

Nor is there any merit to MAZDA's contention that the federal government's 1989 decision to not require lap/shoulder belts in rear-center seats would be undermined by this lawsuit. This decision was not based on any conclusion that lap/shoulder belts would be unsafe or undesirable in that seating position. To the contrary, NHTSA repeatedly stated that lap/shoulder belts were the safest form of seat belt

technology, and it affirmatively *required* lap/shoulder belts in all other seating positions. Instead, the agency's decision to not require lap/shoulder belts in rear-center seats was based on its concerns about the technical difficulties of requiring lap/shoulder belts in all cars and the economic burden such a universal rule would impose on car makers. The U.S. Supreme Court, however, has made it clear that *these sorts of concerns cannot form the basis for a finding of implied preemption.* See *Sprietsma, supra,* 537 U.S. 51.

II. The out-of-state federal cases relied upon by MAZDA have no precedential or persuasive authority here.

In addition to its erroneous reliance on *Geier,* MAZDA cites on a number of cases that do not support its position. MAZDA principally relies on *Griffith v. General Motors Corp.,* 303 F.3d 1276 (11th Cir. 2002), which found implied conflict preemption of the plaintiff's claim that General Motors was negligent for failing to provide a shoulder belt along with a lap belt in the front-center seat of a car. *Griffith,* however, is flawed at its core and should not be given any consideration by this Court.

First and foremost, *Griffith* was decided before the U.S. Supreme Court decided *Sprietsma,* 537 U.S. at 51. As explained above, *Sprietsma* makes clear that an agency's decision not to require a particular safety feature based on its view that the costs of a

universal regulatory requirement might exceed the safety benefits does not preempt common-law claims seeking to hold a manufacturer liable for not installing that safety feature in a particular vehicle. In light of *Sprietsma*, the decision in *Griffith* is clearly wrong.

Second, *Sprietsma* aside, *Griffith* lacks any persuasive authority because it rests on an erroneous factual assumption that renders the entire decision invalid: that the federal government's "technological diversity" goal applied to *both* manual seat belts and passive restraints. In its decision, the Third Circuit asserted that "DOT intended and expected FMVSS 208 to produce a mix of restraint devices, *both passive and manual,* in cars and trucks." 303 F.3d at 1281 (emphasis added). As support for this proposition, *Griffith* relies exclusively on the U.S. Supreme Court's decision in *Geier*. *See id.* (citing *Geier,* 529 U.S. at 879). However, as explained above, *Geier* merely discussed the federal government's technological diversity goal with reference to *passive* restraints, and the Supreme Court never suggested that NHTSA had similar goals with respect to manual restraints in the rear seats of vehicles. This is not surprising, given that MAZDA itself has failed to unearth any regulatory materials that even hint -- let alone demonstrate – that NHTSA ever intended to promote a diverse array of manual restraints in the rear-center seats of passenger cars. This core factual error strips *Griffith* of any even arguable validity.

Third, *Griffith* is distinguishable on its facts. *Griffith* involved claims that a pickup truck was defectively designed because its *front* center seat lacked a lap/shoulder belt. 303 F.3d at 1278. This is an entirely different issue than this case, which involves the *rear* center seat of a passenger car. The 1989 rulemaking that is the centerpiece of MAZDA's preemption argument here was not at issue in *Griffith*, because that rulemaking did not address the front seats of cars. Thus *Griffith* involved a different type of claim; a different options standard; and an entirely different regulatory history than this lawsuit – all reason enough to reject any reliance on the decision outright.

Hurley v. Motor Coach Inds., 222 F.3d 377 (7th Cir. 2000), *cert. denied*, 531 U.S. 1148 (2001) is also inapposite. There, a bus driver sued a bus manufacturer for failing to do more than install a two-point lap belt in his seat, which was the minimum safety feature required by federal law. (The governing version of FVMSS 208 gave the manufacturer the option of installing either a full "passive" system or installing *either* a lap belt or a lap/shoulder belt.) With respect to the claim that the seat should have had a lap/shoulder belt, the Seventh Circuit focused on the fact that NHTSA had expressed concern that *heavy vehicle operators* – *e.g.*, bus drivers – have a particularly "strong aversion" to using seatbelts of any kind. *See id.* at 382. Based on this evidence of seatbelt "aversion" among heavy vehicle operators, *Hurley* concluded that NHTSA's decision to permit

installation of the less-restrictive two-point lap belt (as opposed to the more confining three-point lap/shoulder belt) was specifically designed to "promot[e] safety by encouraging drivers to use the safety equipment that manufacturers install." *Id.* *Hurley* ultimately held that, "as in *Geier*, the decision to leave options open to bus manufacturers *was made with specific policy objectives in mind.* Hurley's suit, if successful, would undermine that policy objective and is therefore preempted." *Id.* (emphasis added).

No such "specific policy objections" could possibly be implicated by this lawsuit. *Hurley's* reasoning would only apply here if NHTSA's decision to give *car makers* the choice of installing lap belts instead of lap/shoulder belts in rear seats was based on a desire to avoid aggravating the public's "aversion" to seatbelts. But the history of FMVSS 208 as it applies to *cars* – and not buses – itself disproves any such conclusion. As previously explained, Standard 208 has *always* required three point lap/shoulder belts in the front driver's and passenger seats of cars. It is therefore apparent that, in NHTSA's view, a three-point system has always been the safest form of manual restraint in *cars,* where the risk of driver "aversion" to seatbelts has not been an issue. Given that there was no evidence of driver "aversion" to seatbelts that influenced NHTSA's rulemaking with respect to the front seats of cars, it would make no sense to assume that any such concern animated the agency's decision to create a regulatory option with respect to the rear seats of cars. Instead, the rear-seat

option can best be understood as reflecting the agency's view (as set forth in the regulatory preamble) that, because rear seats are generally safer and less frequently occupied than front seats, there was no reason to mandate three-point lap/shoulder belts for all rear-center seats. Thus, none of the policy objectives at issue in *Hurley* has any application to this lawsuit.

In sum, there is no basis for this Court to find implied conflict preemption of plaintiffs' no-lap/shoulder-belt claim. The core teaching of *Geier* is that conflict preemption only exists where the common-law claims would directly undermine federal purposes. Try as it might, MAZDA has failed to identify even a single federal purpose that would be undermined or frustrated by a jury verdict holding it liable in this case. In light of the strong presumption against preemption, MAZDA's preemption defense must fail.

VI. PLAINTIFFS' FAILURE TO WARN CLAIM REGARDING THE LAP-ONLY BELT IS AN INDEPENDENT LEGAL THEORY THAT CANNOT BE PREEMPTED.

It is MAZDA's burden to establish Plaintiffs' failure to warn claims (TAC ¶ 30(a), 44, 45, 50, 55.) are preempted. *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 956-957. As a matter of logic, since Plaintiffs' design defect claims are not preempted, their failure to warn claims cannot be preempted.

Nevertheless, even if this Court were to find that Plaintiffs' design defect claims are preempted, their failure to warn claims still cannot be preempted because those claims are independent of their design defect claims.

Under California law, a failure to warn claim is an independent legal theory that does not require any showing of design defect. See *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1110-1113. The jury "'must decide whether a product flawlessly designed and produced may nevertheless possess such risks to the user without a suitable warning that it becomes "defective" simply by the absence of warning.'" *Finn v. G.D. Searle & Co.* (1984) 35 Cal.3d 691, 699, quoting *Cavers v. Cushman Motor Sales, Inc.* (1979) 95 Cal.App.3d 338, 347. "The requisite warning may be of two kinds, each of which may have different implications. First, the manufacturer may be required adequately to instruct the consumer as to how the product should be used. . . . A second distinctive form of warning is that which informs a consumer . . . of potential risks or side effects which may follow the foreseeable use of the product." *Id.* (citations omitted). In short: "In some circumstances a warning or directions would have reduced the risk. In other circumstances the warning would simply have afforded the consumer an opportunity to make an informed choice." *Id.*

Here, PLAINTIFFS' failure to warn claim is not premised on MAZDA's failure to use lap-shoulder belts for the rear center seat, but upon MAZDA's

failure to warn about the dangers of the lap-only belt "because it did not restrain the upper torso of decedent Thanh Williamson, it did not prevent the body of decedent Thanh Williamson from 'jackknifing' around the lap only belt, and it was anchored at an unsafe angle to the SUBJECT VEHICLE." (TAC ¶ 29(a).). If MAZDA had warned Plaintiffs about these dangers, then Plaintiffs could have made an informed decision about (1) whether to purchase the subject vehicle, (2) whether to have Thanh Williamson or anyone else sit in the rear center seat, and (3) whether to install the lap-shoulder belt retrofit kit for the rear center seat. *Because no warnings or information was provided by MAZDA, Plaintiffs did not have the requisite knowledge to make any of these decisions.* That is the essence of Plaintiffs' failure to warn claim. This claim simply has no bearing upon MAZDA's decision to use the lap-only belt over the lap-shoulder belt.

MAZDA vainly attempts to distinguish *Carlin*, even though it was only cited for the general proposition that failure to warn is an independent legal theory, but tellingly, MAZDA utterly fails to address *Finn* and relies solely upon out-of-state authority *because there is no California authority to support its position.*

The weakness of MAZDA's position is belied by the fact that it relies heavily upon *Moser v. Ford Motor Co.* (N.D.W.Va. 2001) 2001 WL 1387600, *an unpublished out-of-state decision.* Since it is unpublished, *Moser* has no persuasive value here.

Even if it did, it would not apply because the court in that case held that the warnings at issue were preempted *solely* because the design defect claims were preempted. As discussed above, Plaintiffs warnings claims are independent of their design defect claims and therefore cannot be preempted.

MAZDA's reliance on several other out-of-state authorities is also misplaced because those cases are inapposite. See *James v. Mazda Motor Corp.* (11th Cir. 2000) 222 F.3d 1323, 1324 (involving failure to warn that the manual lap belt must be worn for automatic shoulder/manual lax belt system); *Irving v. Mazda Motor Corp.* (11th Cir. 1998) 136 F.3d 764, 770 (warnings at issue were preempted solely because the design defect claims were preempted), *Carrasquilla, supra,* 166 F.Supp.2d at 174 (warnings claims preempted only to the extent they attacked the choice of restraints under FMVSS 208).

To hold otherwise would immunize every automobile manufacturer from having to warn about the known dangers of a vehicle simply because an FMVSS gives them a choice of alternative safety devices. That would be contrary to the purposes of the Federal Motor Vehicle Safety Act and the savings clause set forth therein. See 15 U.S.C. § 1397(k) ("[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."); *Geier, supra,* 529 U.S. at 870 (savings clause evidences Congress' intent to "preserve" common law tort claims "that seek to establish greater safety than

the minimum safety achieved by a federal regulation intended to provide a floor.").

VII. CONCLUSION

For the foregoing reasons, Defendant MAZDA's demurrer and motion to strike must be denied in their entirety.

DATED: September 13, 2006

GIRARDI KEESE

By: /s/ David Lira
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[Proof Of Service Omitted In Printing]

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, Inc., a California corporation; FORD MOTOR COMPANY, a Delaware	**CASE NO. 04CC06494** **Assigned: Hon. Michael Brenner** **Department: C20** **DEFENDANTS MAZDA MOTOR CORPORATION'S AND MAZDA MOTORS OF AMERICA, INC.'S REPLY TO PLAINTIFFS' OPPOSITION TO MAZDA'S MOTION TO STRIKE AND DEMURRER**

corporation; AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive, Defendants.	**Date: September 26, 2006** **Time: 1:30 p.m.** **Dept.: C20** Action Filed: 7/07/04 Trial Date: 11/06/06 Motion Cutoff: 7/23/06 Discovery Cutoff: 7/08/06

TO ALL PARTIES AND THEIR COUNSEL OF RECORD HEREIN:

Defendants Mazda Motor Corporation ("MC") and Mazda Motors of America, Inc. ("MNAO") (collectively the "Mazda Defendants") hereby file their Memorandum of Points and Authorities in reply to Plaintiffs' Opposition to Defendants' Motion to Strike and Demurrer as follows:

MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY

I. INTRODUCTION: DESPITE THE VERBAL CONTORTIONS EXECUTED BY PLAINTIFFS, THEIR LAP BELT-ONLY CLAIM IS STILL PREEMPTED

Plaintiff's Opposition effectively seeks to avoid this Court's prior preemption ruling by semantic magic. By sleight of word, they claim that into thin air has vanished two years' of claims that decedent Thanh Williamson's injuries were caused by the lack

of a 3-point seat belt in the rear center seat. And when the smoke clears, they show the Court the same lap belt-only claim, but think the Court will be fooled when Plaintiffs call that same claim by a different, preposterous name.

But preemption and this Court's ruling can and should not be so easily ignored. Plaintiffs' seat belt claims, so obviously based on the preempted claim that MC selected the wrong one of two options that the federal government offered, must be rejected.[1]

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[1] At the hearing on the Motion for Judgment on the Pleadings, this Court noted that "any injury that would have arisen because [the subject vehicle] had lap belt-only seats as opposed to the lap belt and shoulder seats, I believe the moving party is correct in that regard." (Hearing Transcript, p. 7). And the Court granted "the Motion for Judgment on the Pleadings to the extent of that theory of liability of the lap-only seat belt." (Hearing Transcript, p. 9-10). This Court allowed the plaintiffs leave to amend only to allege other causes of decedent's death. This Court neither gave plaintiffs leave to expand their lap belt-only theory of liability against Mazda, nor leave to intertwine their lap belt-only theory with other theories. This Court only granted plaintiffs leave to amend solely to flush out other bases for liability. Plaintiffs did not do so.

As this Court has already recognized, when the subject 1993 MPV was manufactured, NHTSA allowed manufacturers the choice of Type 1 or Type 2 belts in the center rear seating position for a variety of reasons. Having allowed that choice, plaintiffs cannot now contend that the Mazda defendants can be held liable in tort for exercising that choice.

II. PLAINTIFFS' COMPLAINT STILL RESTS ON A CLAIM THAT THE 2-POINT BELT CAUSED FATAL INJURIES THAT A 3-POINT BELT WOULD HAVE PREVENTED.

After this Court's preemption ruling, Plaintiffs filed a Third Amended Complaint that essentially faults the Mazda Defendants not because they used a two-point belt instead of a three- point belt, but rather, because the three-point belt did not act like a three-point belt. Plaintiffs' prior pleadings show that this is not a distinction at all, but if it is, it is one without a difference.

In their now superseded Second Amended Complaint, Plaintiffs alleged that, as to the seat belt, the Mazda MPV was defective in that:

> "It was equipped with inferior and unsafe two-point lap belts in the middle seating positions, *when it should reasonably have been equipped with three-point seat belts,* as the remaining seats in the SUBJECT VEHICLE."

Second Amended Complaint, ¶ 20 a, p. 5:4-6. (emphasis added.)

Plaintiffs reinforced that their claims were previously based on the lack of a three-point belt in their interrogatory responses (of which they sought judicial notice in support of their Opposition to the Mazda Defendants' successful Motion for Judgment on the Pleadings.) For example, Plaintiffs made the following claims:

– "More specifically, the 1993 Mazda MPV was defective in the following ways:

• The rear, outboard seat was equipped with lap-only belts, *causing passengers to 'jackknife.'* (See Plaintiffs' Request for Judicial Notice filed on or about June 22, 2006, Exhibit "A," Response to Interrogatory No. 1, p. 4: 16-18); and

– "More particularly, DEFENDANTS designed the SUBJECT VEHICLE so that the rear seats were equipped with lap only seat belts. Lap-only belts expose users to a substantial risk of abdominal injuries in frontal collisions. The superior and safer lap-shoulder belts were available to be installed in the SUBJECT VEHICLE at the time of assembly." (See Plaintiffs' Request for Judicial Notice filed on or about June 22, 2006, Exhibit "A," Response to Interrogatory No. 35, p. 16: 1-7); and

– *"A lap-shoulder belt would have prevented PLAINTIFFS ALEXA WILLIAMSON and THANH WILLIAMSON from 'jackknifing'* over the lap belt and thus, prevented severe abdominal injuries." (See Plaintiffs' Request for Judicial Notice filed on or about June 22, 2006, Exhibit "A," Response to Interrogatory No. 78, p. 27: 12-13) (emphasis added.)

Now, Plaintiffs state that

"The Third Amended Complaint no longer relies on the allegation that MAZDA

> should have utilized a lap-shoulder belt rather than a lap-only belt, but now alleges that the vehicle's lap-only belt is itself defective "because it did not restrain the upper torso of decedent Thanh Williamson, *it did not prevent the body of decedent Thanh Williamson from 'jackknifing' around the lap-only belt. . . .*"

(Plaintiffs' Opposition at 1:9-13.)(emphasis added.)

To reiterate, Plaintiffs alleged as follows in the SAC and TAC:

SAC: *A lap-shoulder belt would have prevented PLAINTIFFS ALEXA WILLIAMSON and THANH WILLIAMSON from 'jackknifing' over* the lap belt. . . ."

TAC: "the vehicle's lap-only belt is itself defective "because it did not restrain the upper torso of decedent Thanh Williamson, *it did not prevent the body of decedent Thanh Williamson from 'jackknifing' around the lap only belt. . . .*"

It cannot be seriously disputed that the Second and Third Amended Complaints are alleging the same seat belt claim. Nevertheless, Plaintiffs have the temerity to tell this Court that their claims "*do not rest on MAZDA's failure to utilize the lap-shoulder seat belt.*" Opposition at 5:5-8.

Were Plaintiffs truly abandoning their "lap-only belt claims," one would expect those claims to be absent from the TAC. It is thus curious indeed that

Plaintiffs never explain why they still repeatedly discuss a "lap-only belt" throughout the TAC. (See TAC, ¶¶s 29(a), 32, 33, 34, 35, and 36.) The obvious explanation is that Plaintiffs hope to still get to the jury the use of the lap-belt only claim despite this Court's clear prior ruling.

III. THE USE OF OTHER CLAIMS CANNOT REVIVE BARRED CLAIMS

Incredibly, Plaintiffs argue that, by tying their "lap-only belt" claims to other defect claims, they may make an end run around this Court's previous ruling and again allege that the vehicle was defective because it had "lap only belt." This is prohibited.

Plaintiffs cite *Carrasquilla v. Mazda Motor Corp.* (M.D.Pa. 2001) 166 F.Supp.2d 169 as permitting these allegedly intertwined claims. *Carrasquilla*, however, directly supports Mazda. In *Carrasquilla*, the plaintiffs claimed that the subject vehicle should have had an integrated 3-point belt because of the design of the seatback, seat track and the knee bolster. *Id.* at 177. The *Carrasquilla* Court rejected plaintiffs' gamesmanship. "[T]he Court views this precise claim by plaintiffs as nothing more than a backdoor attempt to attack once again defendants' exercise of one of the restraint system options under FMVSS 208." *Id.* at 178. The Court granted summary judgment as to all of plaintiffs' belt claims, all the failure to warn claims, and all defect claims which

were based upon the absence of a 3-point belt system. *Id.* at 181.

This Court should not fall for a backdoor effort similar to that rejected in *Carasquilla*. The only *new* seat belt claim in the Third Amended Complaint is that the lap belt was somehow anchored at an unsafe angle. Respectfully, this Court should grant the demurrer and motion to strike as it relates to all "lap-belt only" claims.[2] If any seat belt claim should survive, it would be the unsafe anchorage angle claim only.[3]

IV. PLAINTIFFS MISUNDERSTAND *GEER V. AMERICAN HONDA*

The rest of Plaintiffs' Opposition merely rehashes their unsuccessful arguments previously made in opposition to the Motion for Judgment on the Pleadings. In response here, the Mazda Defendants repeat their arguments supporting the original Motion for Judgment on the Pleadings.

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[2] Most of plaintiffs' allegations relate directly to the absence of a shoulder belt in the center seating position of rear seat no. one. As an example, in ¶33 of the Third Amended Complaint, plaintiffs allege that the Mazda defendants "engaged in despicable conduct in willful and conscious disregard of the safety of consumers by choosing to utilize a lap-only seatbelt for the center seating position of the middle bench seat in the SUBJECT VEHICLE instead of a three-point seatbelt." How is this allegation not preempted?

[3] This is another potentially preempted issue. FMVSS 209 proscribes the angles at which lap belts can be situated.

Throughout the Opposition, Plaintiffs assert that *Geier* should be narrowly interpreted and applied sparingly. This is ironic given the number of times that *Geier* has been cited for guidance, whether or not a court finds that preemption is warranted.

> *Geier is* not a narrow holding limited to automobile safety standards; instead it established a general rule upholding conflict preemption even if the applicable federal law contains a savings clause.

Dowhal v. Smithkline Beecham Consumer Healthcare (2004) 32 Cal.4th 910, 926 (citing *Sprietsma v. Mercury Marine* (2002) 537 U.S. 51, 63.) It is ironic that the *Dowhal* court relied on *Sprietsma* – a case Plaintiffs cited for the exact opposite proposition.

Plaintiffs' attempt to limit *Geier* by referencing inapposite Ninth Circuit and District Court opinions. First, Plaintiffs cite *Leipart v. Guardian Industries* (9th Cir. 2000) 234 F.3d 1063 which concerned glass breakage safety standards for shower doors – a "non-auto context." What is critical about *Leipart* was that the plaintiffs claims there were *not* based upon an assertion that the shower door manufacturer chose one type of glass when it should have chosen another. No "wrong choice" claim was made.

This issue – whether a plaintiffs claims are based on the defendant's selection of regulation – provided options – was central also in the *Oxygenated Fuels Ass'n v. Davis* (9th Cir. 2003) 331 F.3d 665, 672

decision that Plaintiffs cite. The *Oxygenated Fuels* court distinguished its facts from *Geier*:

> "Second, the Supreme Court in *Geier* found abundant evidence in the administrative history of the FMVSS to indicate that it was intended to give auto manufacturers a choice of safety restraints. *See id.* at 875-83. We can find no evidence that the Clean Air Act was intended to give gasoline producers a comparable choice of oxygenates."

See Plaintiffs' Opposition at 16.

Thus, even the Plaintiffs' own authority shows two critical points. First, *Geier* is applicable outside the air bag/no air bag context. Second, the critical factor for whether *Geier* preemption applies is whether there was an intention by the regulation to provide options to the defendant. It is clear that FMVSS 208 gave the defendants the option of installing a lap/shoulder-belt, or lap belt, in the rear center seat.

Similarly, *Kent v. Daimler Chrysler Corp.* (N.D. Cal. 2002) 200 F.Supp. 2d 1208, 1210 and *Chamberlan v. Ford Motor Company* (N.D. Cal. 2004) 314 F.Supp. 2d 953 prove, rather than disprove, the viability of *Geier* and its applicability to this matter. In *Kent*, the court succinctly indicated why *Geier* was inapplicable:

> Defendant has pointed to nothing, either in the regulation or in the history of the regulation, suggesting that Plaintiffs' lawsuit

> frustrates the purpose of FMVSS 102. In contrast to the standard at issue in *Geier*, FMVSS 102 does not give manufactures [*sic*] a choice with respect to transmission design.

Kent, supra, 200 F.Supp. 2d at 1215. The *Kent* court could not have made it any clearer that it viewed *Geier* as turning on whether a manufacturer exercised a NHTSA-required choice.

Chamberlan involved a class action concerning allegedly defective intake manifolds, and whether injunctive relief under the California Unfair Competition Law was preempted by federal law. As Plaintiffs admit, the *Kent* court found that there was no substantive regulation at issue in its case. *Id.* at 17 (citing *Chamberlan, supra*, 314 F.Supp. 2d at 963). The *Kent* court's discussion of *Geier* is instructive:

> As the result of a considered policy choice, under FMVSS 208, manufacturers had no duty to install air bags at the time they manufactured the plaintiffs' car, yet the *Geier* plaintiffs' tort claims relied upon precisely such a duty. [Citing *Geier* at 529 U.S. at 881.] The Court held that allowing a State law tort claim to proceed under these circumstances would in effect impose a safety standard upon manufacturers different than that imposed by the Department of Transportation's well considered regulation.

Chamberlan, supra, 314 F.Supp. 2d at 963 (citing *Geier, supra*, 529 U.S. at 881.)

If one were to substitute the air bag discussion for one concerning shoulder/lap belts, the *Kent* court's description of *Geier* is equally applicable here. NHTSA made a considered policy choice under FMVSS 208, so manufacturers had no duty to select a lap/shoulder belt over a lap belt; NHTSA said it could choose *either* one. Allowing the Plaintiffs here to have a state law claim based upon the choice of one safety belt system over another would impose "a safety standard upon manufacturers different than that imposed by the Department of Transportation's well-considered regulation."

V. NHTSA'S PURPOSES WOULD BE FRUSTRATED BY BANNING ALL TYPE 1 BELTS

NHTSA's decision to provide a Type 1 option was deliberate. In fact, in the late 1980's, when it mandated lap/shoulder belts for rear *outboard* seating positions, NHTSA decided *not* to require lap/shoulder belts in rear non-outboard seating positions. See 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989); 53 Fed. Reg. 47982, 47984-47985 (Nov. 29, 1988). In deciding to maintain the existing option for either lap belts or lap/shoulder belts in rear non-outboard positions, NHTSA focused on a number of important policy concerns.

First, NHTSA concluded that technical and cost issues weighed decisively against a lap/shoulder belt requirement for rear non-outboard seating positions. NHTSA noted that a number of commenters had

objected to the structural changes that would be needed for lap/shoulder belts in rear non-outboard seating positions. See 53 Fed. Reg. at 47984. Others pointed out the high costs and small anticipated benefits that rear center lap/shoulder belts would provide. *Id.*

The American Seat Belt Council had pointed out, *inter alia*, that lap/shoulder belts in rear center seating positions had "little field testing." *Id.* Other commenters noted that there would be difficulties in locating the anchorage for a rear center lap/shoulder belt in a variety of vehicles. The anchorages in hatchbacks or station wagons would have to be located either in the loadspace floor (disrupting the cargo carrying area) or on the vehicle roof (which would impede the driver's rearward vision). *Id.*

In the preamble to the November 1989 final rule on lap/shoulder belts in rear seating positions, NHTSA reiterated its conclusion that the lap/shoulder belt requirement should apply only to rear outboard seating positions, noting that:

> [s]ome commenters suggested that technologies and designs are available to provide lap/shoulder belts at rear center seating positions, and that NHTSA should further examine this issue. The agency explained in the NPRM that there are more technical difficulties associated with any requirement for lap/shoulder belts at center rear seating positions, and that lap/shoulder belts at center rear seating positions would yield

> small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task. Accordingly, this rulemaking excluded further consideration of a requirement for center rear seating positions. None of the commenters presented any new data that would cause the agency to change its tentative conclusion on this subject that was announced in the NPRM.

54 Fed. Reg. at 46258.

NHTSA had also been concerned about the compatibility between child safety restraints and a requirement that lap/shoulder belts be provided at all rear designated positions. As noted above, the consistency between restraint requirements and child safety has been a recurring them [sic] in FMVSS 208 rulemakings. Thus, in denying the 1984 petition to require lap/shoulder belts at outboard rear seating positions, NHTSA not only disagreed with petitioners' premise that booster seats secured with lap/shoulder belts would be safer than would booster seats secured with tethers, but also stated that:

> [t]he installation of Type 2 belts in the rear outboard seating positions would make the installation of the conventional child safety seat much less convenient than with the current Type 1 belt. This would occur because the shoulder portion of a Type 2 belt would have to be placed behind the restraint, or otherwise moved out of the way, since most child restraints are designed to be used only

> with lap belts. This is an important consideration in view of the fact that 44 States and the District of Columbia have laws requiring the use of child safety seats. These State use laws make it desirable that compliance be accomplished as smoothly as possible.

49 Fed. Reg. at 15241-15242.

Against this background, the agency's decision not to require lap/shoulder belts in the rear center position; but rather to continue to give manufacturers the *option* of providing lap belts *or* lap/shoulder belts in rear non-outboard seats (including the rear center seat), makes eminent sense and clearly reflects a deliberate policy decision. The decision fosters flexibility, incorporates an appropriate assessment of the excessive costs that a lap/shoulder belt requirement would have imposed, reflects well-founded concerns – including safety concerns – about the technological problems that would be created by a lap/shoulder requirement for rear non-outboard seats, and demonstrates a prudent approach to the knotty and continuing dilemma posed by the seat belt/child restraint compatibility problem.

NHTSA has also recognized that lap belts should be allowed in seating positions which are adjacent to an aisle (like Mrs. Williamson in the subject MPV) to assist with ingress and egress for passengers going to the far rear seat.

> NHTSA has long recognized that belts installed at seating positions located adjacent to an aisle can impede ready access to or egress from seats located behind them. That is why we originally allowed lap belts at these seating positions.

69 Fed. Reg. No. 235, p. 70909.

VI. PLAINTIFFS' FAILURE TO WARN CLAIM ABOUT THE LAP ONLY BELT IS PREEMPTED

Just like Plaintiffs' assertions that MC should have used a 3-point belt in Mrs. Williamson's seating position rather than selecting the other option (a 2-point belt), Plaintiffs' failure to warn claims are preempted by FMVSS 208. Plaintiffs cited to *Carlin v. Superior Court* (1996) 13 Cal.4th 1104 and *Finn v. G. D. Searle & Co.* (1984) 35 Cal.3d 691, 699 for the proposition that a failure to warn claim is protected from preemption. Plaintiffs assert that a vehicle may become defective "simply by the absence of warning." *Id.* at 22-23.

The problem with plaintiffs' position is that they did not make these types of allegations in the Third Amended Complaint. The Third Amended Complaint alleges that the Mazda defendants "failed to adequately warn and instruct PLAINTIFFS and other consumers about the hazard, risks and dangers of" the alleged defects in the vehicle. (Third Amended Complaint, ¶ 30(a). **The failure to warn**

allegations come down to Plaintiffs' assertion that Mazda failed to warn that the belt was defective. This is not a claim that the lack of a warning made the "product flawlessly designed . . . became 'defective' simply by the absence of a warning." *G. D. Searle, supra,* 35 Cal.3d at 699. (See also *Carrasquilla v. Mazda Motor Corp., supra,* 166 F.Supp.2d at p. 177, where the court rejected plaintiffs claim that the subject vehicle should have had an integrated 3-point belt because of the design of the seatback, seat track and the knee bolster, and that defendant should be held liable for failing to warn of this defect. *Id.* at 177. Not only did the court reject all of plaintiffs' belt claims, it denied all failure to warn claims based upon the absence of a 3-point belt system. *Id.* at 181.

VII. PLAINTIFFS WAIVED ANY ERROR IN THIS COURT'S PRIOR RULING

"[W]here the plaintiff chooses to amend [after a demurrer is sustained with leave to amend], any error in the sustaining of the demurrer is ordinarily waived." (citing *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 311; *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 312.)

While *County of Santa Clara* dealt with a demurrer, the rule is equally applicable to this Court's ruling on the Motion for Judgment on the Pleadings. *Singhania v. Uttarwar* (2006) 38

Cal.Rptr.3d 861, 866; *Anmaco, Inc. v. Bohlken* (1993) 16 Cal.Rptr.2d 675, 680. By acquiescing to this Court's ruling on the Motion for Judgment on the Pleadings and filing a Third Amended Complaint, Plaintiffs have waived any alleged error in this Court's prior ruling.

VIII. CONCLUSION

This Court previously dismissed as preempted Plaintiffs' claims that a three-point belt, instead of a "lap-only belt," would have prevented Plaintiffs' "jackknifing" and other injuries. Now, Plaintiffs seek to revive those claims by assert [sic] that the lap-only belt was defective because it did not prevent Plaintiffs' "jackknifing" and other injuries, i.e., the 2-point belt did not act like a 3-point belt.

These claims sound the same because, despite all of Plaintiffs' protestations, they are the same. Both claims are based upon the assertion that a 3-point belt would have prevented Plaintiffs' injuries.

The function of our courts relies on truth and examination, not illusion. A simple evaluation of Plaintiffs' seat belt claims shows that they are barred, and cannot be reconsidered through the TAC.

This Court's prior considered ruling dismissing the Plaintiffs' "lap-belt only" claims, and the underlying doctrine of preemption, cannot be gutted by Plaintiffs' verbal sophistry. The Mazda Defendants'

Demurrers and Motion to Strike should be granted without leave to amend.

DATED: September 19, 2006

BOWMAN AND BROOKE LLP

By: /s/ [Illegible]
Brian Takahashi
Robert S. Robinson
Julian G. Senior
Attorneys for Defendants
MAZDA MOTOR CORPORATION and MAZDA MOTOR OF AMERICA, INC. dba MAZDA NORTH AMERICAN OPERATIONS

[Proof Of Service And Service List Omitted In Printing]

SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
DEPARTMENT C20

DELBERT WILLIAMSON, ET AL.,	)	
PLAINTIFFS,	)	
VS.	)	NO. 04CC06494
MAZDA MOTOR OF AMERICA, INC.,	)	
DEFENDANT.	)	

THE HONORABLE
MICHAEL BRENNER, JUDGE PRESIDING

REPORTER'S TRANSCRIPT

TUESDAY, SEPTEMBER 26, 2006

APPEARANCES OF COUNSEL:

FOR PLAINTIFFS: GIRARDI AND KEESE
ATTORNEYS AT LAW
BY: DAVID R. LIRA

FOR DEFENDANT: BOWMAN AND BROOKE
ATTORNEYS AT LAW
BY: JULIAN G. SENIOR
AND
BRIAN TAKAHASHI

KIMBERLY REX, RMR, CSR #6638
OFFICIAL COURT REPORTER

[2] **SANTA ANA, CALIFORNIA – TUESDAY, SEPTEMBER 26, 2006**

AFTERNOON SESSION

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT:)

THE COURT: WELL, WILLIAMSON VERSUS MAZDA MOTORS OF AMERICA.

MR. LIRA: GOOD AFTERNOON. DAVID LIRA, GIRARDI AND KEESE ON BEHALF OF THE PLAINTIFFS IN THIS ACTION.

MR. SENIOR: GOOD AFTERNOON, YOUR HONOR. JULIAN SENIOR ON BEHALF OF THE MAZDA DEFENDANTS.

MR. TAKAHASHI: BRIAN TAKAHASHI FOR BOWMAN AND BROOKE ON BEHALF OF MAZDA MOTOR CORPORATION, MAZDA MOTORS, INC.

THE COURT: WELL, HERE IS JUST ONE INITIAL THOUGHT ON MY MIND, IT MAY BE THAT THE DEFENDANT CANNOT BE LIABLE FOR CHOOSING A TWO-POINT SEAT BELT INSTEAD OF A THREE-POINT SEAT BELT.

IT MAY BE THAT – IT SEEMS LIKE I HAVE RULED THAT THE DEPARTMENT OF TRANSPORTATION, AS I REMEMBER THIS, SURVEYED ALL THIS, DECIDED THAT THEY HAD A METHOD OF PROCEEDING THAT WAS GOING TO HAVE DIFFERENT KINDS OF – IT WAS

GOING TO REQUIRE PASSIVE RESTRAINTS FOR SAFETY REASONS; BUT, THE SECRETARY, SOMEBODY DETERMINED THAT IT WOULD BE BETTER TO HAVE DIVERSITY OF PASSIVE RESTRAINTS. AND THE REASON FOR THAT WAS – WELL, THERE WAS ALL KINDS OF [3] REASONS.

AND THAT IS ALL MENTIONED IN ALL THESE CASES. BUT THAT DOESN'T MEAN THAT YOU COULDN'T STATE A CAUSE OF ACTION BASED – ONCE YOU DECIDE TO PUT A TWO-POINT – WELL, A LAP BELT IN, YOU COULD BE NEGLIGENT IN HOW YOU HOOKED IT UP OR NEGLIGENT IN HOW YOU DESIGN THE SEAT THAT WAS GOING TO ACCOMMODATE IT, OR ANY OTHER TORT THEORY.

AND IT SEEMS LIKE, PERHAPS, THAT IS WHAT THE PLAINTIFFS HAVE ADEQUATELY PLED IN THIS – WHATEVER THE COMPLAINT IT IS.

MR. LIRA: THIRD.

THE COURT: THIRD AMENDED COMPLAINT. SO, TENTATIVELY I WOULD OVERRULE THE DEMURRER.

MR. SENIOR: YOUR HONOR, IF I MAY?

THE COURT: YES.

MR. SENIOR: I WOULD AGREE WITH ALMOST EVERYTHING YOU SAID EXCEPT FOR

THE LAST PORTION OF WHAT YOU SAID IN YOUR TENTATIVE.

FIRST OF ALL, LET ME JUST BACK UP ON THE HISTORY OF IT.

THE COURT: I READ – I DON'T WANT TO -- SORRY TO INTERRUPT YOU, BUT I HAVE READ ALL OF IT. TODAY SOMEBODY SUBMITTED A NEW, YOU KNOW, MORE MATERIAL FROM THE DEPARTMENT OF TRANSPORTATION, 1.5 OR SOMETHING. I GLANCED THROUGH THIS.

MR. SENIOR: WELL, I THINK THE FIRST THING THAT GOES [4] VIS-A-VIS OUR MOTION TO STRIKE IS THE FACT THAT YOU SPECIFICALLY TOLD PLAINTIFFS THAT THEY HAD THE RIGHT TO PLEAD OTHER CAUSES OF ACTION, SUCH AS, AND I THINK YOUR QUOTE IS, MAYBE IT IS THE DESIGN OF ANGLE OF THE SEAT, THE BACK OF THE SEAT, I FORGET EXACTLY, BUT THERE ARE OTHER THEORIES.

SO YOU SAID THAT THEY CANNOT ADD NEW THEORIES, BUT THEY CAN JUST MORE OR LESS FLUSH OUT THE IDEA THAT THERE WERE OTHER THEORIES. THAT IS ON PAGE 10 OF THE TRANSCRIPT.

NOW, IN THE THIRD AMENDED COMPLAINT, AND THIS IS IN OUR MOTION TO STRIKE, THEY ADDED 17 PARAGRAPHS THAT ONLY GO TO THE LAP BELT. THAT IS ALL THEY TALK ABOUT, THE FMVSS STANDARDS, THE REQUIREMENTS, THE

HISTORY OF FMVSS 208 AS IT GOES TO LAP BELTS.

THE COURT: I KNOW. THERE IS A LOT OF THAT IN THERE. LET ME ASK YOU THIS, AT THE TIME OF TRIAL, SOME TRIAL JUDGE IS GOING TO HAVE SORT THIS ALL OUT, HOW YOU – AS I STARTED READING THAT COMPLAINT, INITIALLY YOU THINK, WAIT A MINUTE, WE'RE BACK TO THE LAP BELT AGAIN.

I READ IT AND REFLECTED ON IT, IT SEEMED TO ME, AND I WANT TO HEAR FROM YOU, BUT THEY ESSENTIALLY READ AS A WHOLE – I KNOW THEY PUT IN A LOT OF STUFF ABOUT NO JURY IS EVER GOING TO HEAR ABOUT ALL THIS TRANSPORTATION SAFETY BUSINESS; BUT ESSENTIALLY THAT, YOU KNOW, THAT THEY HAVE ADEQUATELY PLED THAT IN THE COMPLAINT.

[5] THAT YOU CAN – THE WAY THIS LAP BELT WAS INSTALLED, THERE IS ALLEGATIONS IN THERE ABOUT THE MATERIALS USED AND THE CRASH WORTHINESS OR SOMETHING, BUT ALSO THE SEAT, I REMEMBER THAT SPECIFICALLY, HOW THE – I MEAN, HOW YOU COULD – IT CAN'T BE THAT ONCE YOU COULD HAVE A LAP BELT, THAT YOU COULD JUST PUT ANYTHING IN THERE ANYWHERE. THAT CAN'T BE.

MR. SENIOR: NO, THAT IS NOT WHAT THE MAZDA DEFENDANTS ARE SAYING. WE ARE NOT ARGUING THAT THEY ARE PREEMPTED

FROM ALLEGING THAT THE SEAT BACK IN THE VEHICLE IS DEFECTIVE.

WE'RE NOT ARGUING THAT THEY'RE PREEMPTED FROM SAYING THE SEAT CUSHION IS DEFECTIVE OR THE VEHICLE STRUCTURE IS DEFECTIVE.

BUT, FOR EXAMPLE, IN PARAGRAPH 29(A) THEY MAKE THE EXACT SAME ALLEGATION THEY DID BEFORE," THE CENTER SEAT POSITION WAS EQUIPPED WITH AN INFERIOR AND UNSAFE LAP ONLY BELT. IT DID NOT PROVIDE ADEQUATE PROTECTION BECAUSE IT DID NOT RESTRAIN THE UPPER TORSO OF THE DECEDENT. IT DID NOT PREVENT THE BODY OF THE DECEDENT FROM JACK-KNIFING AROUND THE LAP ONLY BELT."

NOW THEY CAN'T HAVE THOSE EXACT SAME ALLEGATIONS THAT THEY HAD BEFORE. THEY CAN TALK ABOUT THE ANCHORAGE POSITION.

THE COURT: THOSE ARE JUST ALLEGATIONS. WHERE ARE WE GOING ON THIS CASE? SOMEHOW WE HAVE TO GET SOME CLOSURE [6] HERE. YOU CAN PICK THROUGH THIS COMPLAINT FOREVER.

BUT IT SEEMS TO ME AT THE TIME OF TRIAL MAYBE THIS WILL ALL BE MOTIONS IN LIMINE, BUT WHAT I HAVE RULED SO FAR IS THAT YOU CAN'T HAVE LIABILITY JUST BASED

ON IT BEING A LAP BELT. RIGHT OR WRONG, WHETHER I AM RIGHT OR WRONG ON THAT, THAT IS THE COURT'S RULING.

AND TO THE EXTENT YOU DID THAT, YOU CAN FIND THAT LANGUAGE IN THERE, WELL, I DON'T THINK THEY'RE GOING TO BE ABLE TO PROCEED ON THAT.

MR. SENIOR: BUT THOSE PARAGRAPHS SHOULD BE STRICKEN FROM THE COMPLAINT BECAUSE WE'RE GOING TO BE BACK HERE AGAIN ON A MOTION IN LIMINE, WE'RE GOING TO BE BACK HERE AGAIN ON A MOTION FOR JUDGMENT ON THE PLEADINGS.

I MEAN, FOR THEM TO ARGUE THAT THEY'RE NOT TALKING ABOUT THE LAP ONLY BELT IS A LITTLE RIDICULOUS WHEN THEIR BRIEF THAT THEY SUBMITTED IN OPPOSITION TO OUR DEMURRER –

THE COURT: THE COMPLAINT IS SORT OF A BRIEF IN A CERTAIN WAY.

MR. SENIOR: EXACTLY. WHICH THEY DIDN'T HAVE LEAVE TO DO. BUT THE BRIEF THAT THEY SUBMITTED IS VERBATIM, PAGES 7 THROUGH 22 OF THIS OPPOSITION, SAME AS 3 THROUGH 16 INCLUDING A SECTION THAT SAYS THAT THE CHOICE OF USING A – "PLAINTIFF'S CLAIMS REGARDING A LACK OF A THREE-POINT SEAT BELT ARE NOT IMPLIEDLY

PREEMPTED BY 208." THEY'RE MAKING THE SAME ARGUMENT AGAIN.

[7] WE DON'T WANT TO BE FACING THIS EXACT SAME ARGUMENT – YOU KNOW, WE HAVE A TRIAL NOVEMBER 6TH AND THEY STILL HAVE GOT THESE ALLEGATIONS IN BLATANT VIOLATION OF THIS COURT'S ORDER. THEY DIDN'T ASK FOR RE-HEARING. THEY DIDN'T APPEAL THIS COURT'S ORDER. WE SHOULD AT LEAST STRIKE ANY REFERENCE TO LAP ONLY BELT.

THE PARAGRAPHS THAT WE REQUESTED TO BE STRICKEN, THEY CAN PROCEED ON THESE OTHER CLAIMS: THE SEAT BACK CLAIMS, THESE SEAT CUSHION CLAIMS, THE GEOMETRY CLAIMS PERHAPS.

THE COURT: WE'RE JUST NOW TALKING ABOUT THE LAP ONLY BELT. YOU HAVE A RIGHT – ALL OF YOU KNOW THIS AREA VERY WELL. SEE, JUST SITTING HERE THIS AFTERNOON, IT'S VERY HARD FOR A TRIAL COURT TO COME UP TO SPEED THAT YOU GUYS ARE ON ON THIS KIND OF, WHAT SEEMS TO ME, TO BE SORT OF AN ARCANE ISSUE. I AM SURE YOU GUYS KNOW IT VERY WELL.

WE'RE GOING TO BE TALKING ABOUT A LAP ONLY BELT. IF YOU CHOOSE A LAP ONLY BELT, THEN YOU HAVE TO DESIGN AROUND THE LAP ONLY BELT.

MR. SENIOR: I THINK WE WOULD TAKE ISSUE WITH NEVER USING THE PHRASE "LAP ONLY" CONSIDERING THAT THAT IMPLIES THAT THERE SHOULD BE MORE, WHICH I THINK PREEMPTS IT.

THE COURT: THAT MAY BE TRUE. I DON'T THINK THAT ANYTHING I COULD DO TODAY WILL ELIMINATE MOTIONS IN LIMINE, TO BE HONEST WITH YOU.

MR. SENIOR: SO THEY BROUGHT THE EXACT SAME CLAIMS [8] THAT WERE ALREADY ADJUDICATED. AND ACTUALLY, AS A MATTER OF JUST PROCEDURE, YOUR HONOR, WE'RE STILL AWAITING YOUR HONOR'S SIGNATURE ON THE ORDER FROM THE MOTION JUDGMENT ON THE PLEADINGS HERE. I THINK SEVERAL ORDERS WERE SUBMITTED. WE HAVEN'T HAD A SIGNED ORDER YET.

MR. TAKAHASHI: YOUR HONOR, IF I MIGHT ADD, IF YOU DO STRIKE WHAT WE REQUESTED THAT DEAL WITH THE PARAGRAPHS THAT DEAL WITH THE LAP ONLY AND YOU STRIKE THE PORTIONS OF THEIR COMPLAINT THAT TALKS ABOUT LAP ONLY, LEAVE IT TO THE GEOMETRY CLAIM, THE SEAT BACK CLAIM, WE'RE ABOUT TO EMBARK ON A WHOLE BUNCH OF EXPERT DEPOSITIONS, AND THIS CASE WOULD BE A LOT CLEARER AS TO WHAT PEOPLE CAN AND CANNOT TALK ABOUT.

SO THIS REALLY IS IMPORTANT FROM AN EFFICIENCY STANDPOINT AS WE PROCEED FORWARD IN THE CASE.

THEY HAVE FLOUTED THE PREVIOUS COURT ORDER WHICH SAYS THAT THEY CANNOT BRING A LAP-ONLY CLAIM. AND IT IS LAP ONLY THROUGHOUT AND THROUGHOUT AND THROUGHOUT.

WHEN THEY TALK ABOUT THE LAP ONLY NOT RESTRAINING THE UPPER TORSO, THEY'RE BASICALLY SAYING THE ALTERNATIVE DESIGN SHOULD HAVE BEEN A SHOULDER BELT.

SO STRIKING PORTIONS OF THEIR COMPLAINT IS VERY IMPORTANT FOR HOW DISCOVERY PROCEEDS IN THE NEXT FEW MONTHS – NOT FEW MONTHS, FEW WEEKS.

MR. LIRA: YES, YOUR HONOR, IF I MAY. I WASN'T HERE AT THE LAST HEARING, AND I THOUGHT LONG AND HARD AFTER [9] READING ALL THE BRIEFS IN THIS CASE, CONSIDERING THE COURT'S ORDER AND BEING THE PERSON THAT WOULD TRY THIS CASE ON BEHALF OF PLAINTIFFS, I WAS LOOKING AHEAD.

WHAT EVIDENCE CAN I PUT ON AND WHAT EVIDENCE WILL BE BARRED BASED ON THE RULING?

WE RESPECTFULLY DISAGREE WITH THE COURT'S INTERPRETATION OF *GEIER*, WHICH IS AN AIR BAG CASE WHICH INVOLVED A

PASSENGER RESTRAINT. THESE SEAT BELTS ARE NOT PASSENGER RESTRAINTS. YOU HAVE TO HOOK THEM.

SO THERE IS A DISTINCTION THERE THAT WE THINK THERE IS –

THE COURT: I THOUGHT THAT MAKES THEM PASSIVE IN THAT AT THE TIME OF THE ACCIDENT THE DRIVER DOESN'T HAVE TO DO ANYTHING. THAT STILL – I AM TALKING ABOUT SOMETHING THAT YOU KNOW ALL ABOUT THAT I DON'T.

MY IMPRESSION FROM READING THIS IS THAT IS ALSO A PASSIVE RESTRAINT. YOU COULD HAVE OTHER PASSIVE – YOU COULD MAKE THE INSIDE OF THE CAR OUT OF MARSHMALLOW OR SOMETHING. BUT THE – I THOUGHT THAT THE DEFINITION OF A PASSIVE RESTRAINT IS SOMETHING THAT PASSENGERS DIDN'T HAVE – ONCE YOU START THE CAR ROLLING, YOU DON'T HAVE TO DO ANYTHING.

MR. LIRA: NO. THE PASSIVE RESTRAINTS FOR SEAT BELTS IS OLD DAYS IS WHEN YOU SAT DOWN YOU CLOSED YOUR DOOR AND IT LATCHED OVER YOU. YOU DID NOTHING. THESE BELTS YOU HAVE TO MANLY [sic] INSERT. SO THEY DON'T FALL UNDER THE [10] DEFINITION OF PASSIVE RESTRAINT UNDER THE NHTSA RULES, AND I THINK COUNSEL WILL AGREE WITH THAT.

WHEN I WAS THINKING LONG AND HARD ABOUT THIS CASE, YOUR HONOR, THERE IS NO PRECEDENT IN THE STATE OF CALIFORNIA AS YOU KNOW. NO CASE LAW REGARDING CONTRACT PREEMPTION AS TO ACTIVE RESTRAINTS, WHICH THIS IS.

AND WE'RE OF THE OPINION, AND I DON'T WANT TO REARGUE THE PAST MOTION, THAT THERE IS NO IMPLIED CONFLICT BECAUSE THERE IS NO OBSTACLE TO WHAT NHTSA IS TRYING TO DO REQUIRING SEAT BELTS IN THEIR VEHICLES.

AND I AM THE ONE, I AM THE CULPRIT THAT THIS AFTERNOON FILED A REQUEST FOR JUDICIAL NOTICE OF THE FEDERAL REGISTER, THE LAST TIME 208 WAS AMENDED, WHICH IS DECEMBER 8, 2004, WHEN THEY'RE TALKING ABOUT ANTON'S LAW WHICH TAKES EFFECT IN 2007 WHERE ALL SEATS MUST HAVE THE THREE-POINT BELTS REGARDLESS.

AND IN THEIR – AND AT PAGE 70912, UNDER FEDERAL, AND THEY'RE TALKING ABOUT THE HISTORY OF THREE-POINT, TWO-POINT, THEY SAY THE FINAL RULE IS NOT INTENDED TO PREEMPT STATE TORT CIVIL ACTION. I HAVE BEEN DOING THESE CASES FOR EIGHT YEARS, I HAVE NEVER BEEN PREEMPTED ON THESE TYPES OF CASES.

AND WITH THE COURT'S RULING AS IT PRESENTLY STANDS, I DON'T THINK I COULD

PUT ON A CASE ON BEHALF OF MY CLIENTS. I REALLY DON'T.

AND I READ – I AM VERY FAMILIAR WITH THE [11] LEGISLATIVE HISTORY, HOW OUR GOOD ATTORNEY GENERAL SAID DO NOT ADOPT *GEIER* OR DON'T LET IT GO BEYOND THE FOUR LETTERS OF THAT RULING.

AND IN *GEIER* –

THE COURT: HOW CAN WE SET IT UP SO THAT YOU CAN GET APPELLATE REVIEW?

MR. LIRA: IF YOU STRIKE ALL THESE ALLEGATIONS, I AM LEFT WITH NOTHING. BECAUSE I WILL BE CANDID WITH THIS COURT, I AM ONLY THINKING ABOUT THE TRIAL. I AM NOT GOING TO OFFEND THE COURT BY TRYING TO GET EVIDENCE IN THAT IS BARRED.

THE PLAINTIFFS IN THIS CASE THAT SUFFERED THE LOSS OR THE DEATH OF THIS YOUNG WOMAN, WE SPENT HUNDREDS OF THOUSANDS OF DOLLARS DOING TESTING. SLED TESTING TO PROVE OUR POINTS ABOUT THE INFERIOR NATURE OF THIS LAP ONLY BELT. SHE WAS EVISCERATED BY THIS BELT. WE SPENT HUNDREDS OF THOUSANDS OF DOLLARS.

NOW WHAT I AM THINKING ABOUT THE COURT'S RULING, WE CAN'T TALK ABOUT THE BELT. BUT THE BELT IS INTEGRAL BECAUSE HAD SHE HAD THE THREE-POINT BELT LIKE

THE TWO OTHER OCCUPANTS, SHE WOULD BE HERE TODAY. THEY SURVIVED.

THE COURT: THAT IS WHERE YOU DISAGREE WITH THE COURT.

MR. LIRA: YES, EXACTLY.

MR. SENIOR: YOU SEE MY POINT, YOUR HONOR? THAT [12] THEY ARE STILL TRYING TO MAKE THESE THREE-POINT BELT CLAIMS IN THIS COMPLAINT. THAT IS WHAT THEY'RE GOING TO DO THROUGHOUT.

THE COURT: WELL, THIS IS JUST TALKING ABOUT NOTHING; BUT, INFORMALLY, THAT IS WHY IT OCCURRED TO ME. IF I AM WRONG ON THIS, THERE SHOULD BE SOME REVIEW ON THIS BY THOSE WHO HAVE MORE TIME TO LOOK AT THIS THAN I DO. THAT IS MY RULING.

MR. LIRA: AND I AGREE, YOUR HONOR. I AM THINKING – I AM HERE THINKING I DON'T WANT TO CHARGE MY CLIENTS THE COST OF FLYING ALL MY CLIENT EXPERTS FROM ALL OVER THE COUNTRY, THEIR EXPERTS, AND SPEND ANOTHER 100,000 OR SO IN MONEY FOR A CLAIM THAT IS NOT GOING TO HAVE ANY LEGS IF WE CANNOT REFER TO THE THREE-POINT VERSUS TWO-POINT BELT. WE WON'T BE ABLE TO DO IT.

I WILL BE TRYING A CASE IN FRONT OF YOU ON NOVEMBER 6, MIGHT AS WELL GIVE A NON-SUIT.

THE COURT: WHAT WOULD YOU LIKE ME TO DO?

MR. LIRA: I THINK SO I CAN SEEK APPELLATE REVIEW BASED ON THE PRIOR RULING, IF THE COURT WAS TO SUSTAIN THE DEMURRER COMPLETELY WITHOUT LEAVE, THEN I KNOW WHERE I GOT TO GO. WITH A WRIT – I AM NOT SAYING I AGREE WITH THE COURT YOU SHOULD DO IT, BUT THE OUT-COME WOULD BE IF YOU DISMISS THE CASE WITHOUT LEAVE, THEN I WILL TAKE MY CHANCES WITH THE COURT OF APPEALS.

AND I DON'T SAY THAT WITH ANY DIS-RESPECT.

[13] THE COURT: I UNDERSTAND THAT.

MR. LIRA: I AM THINKING OF THE MONEY INVOLVED HERE AND WHAT WE HAVE SPENT SO FAR.

THE COURT: AND, FRANKLY, I THOUGHT ABOUT THAT WHEN COUNSEL MADE HIS STATEMENT. I KNOW EVERYBODY STARTS SPENDING MONEY LIKE MAD. AND I THINK THAT YOU OUGHT TO – I CERTAINLY WOULD WELCOME A REVIEW OF MY RULING IN THAT REGARD.

MR. LIRA: I KNOW –

THE COURT: AND THAT IS WHAT I WILL DO. MAYBE I WILL JUST SUSTAIN THIS WITHOUT LEAVE, AND THAT WILL GIVE YOU THAT OPPORTUNITY.

MR. SENIOR: I HAVE NO OBJECTION TO MR. LIRA'S SUGGESTION.

MR. TAKAHASHI: WE HAVE NO OBJECTION.

MR. LIRA: AND THE REASON I SAY THAT, YOUR HONOR, IS BECAUSE THIS WILL BE A CASE OF FIRST IMPRESSION IN THE STATE OF CALIFORNIA. I TELL YOU, I HAVE 50 OTHER CASES IDENTICAL TO THIS WHERE SOMEONE HAS BEEN KILLED OR IS A QUADRIPLEGIC BECAUSE OF THESE LAP BELTS. AND WE WANT TO KNOW, I MEAN THE PLAINTIFFS' BAR, WHERE WE STAND ON THIS.

THE COURT: IT ISN'T GOING TO OFFEND ME A BIT.

MR. TAKAHASHI: AND, YOUR HONOR, FOR THE RECORD THIS IS A VERY HIGH-ENERGY CRASH, AND TO SAY THAT PEOPLE ARE EVISCERATED OR KILLED BECAUSE OF THE LAP BELT, WE TAKE ISSUE WITH THAT.

[14] MR. LIRA: SEE MY CLIENTS.

THE COURT: THAT IS NOT WHAT WE'RE TALKING ABOUT. ALL RIGHT. ANYTHING FURTHER?

MR. TAKAHASHI: NO, YOUR HONOR. IF THAT IS THE RULING OF THE COURT.

MR. SENIOR: WELL, IS THAT THE RULING OF THE COURT?

THE COURT: THERE YOU GO. DEMURRER SUSTAINED WITHOUT LEAVE.

MR. LIRA: AS TO ALL CAUSES OF ACTION?

THE COURT: AS TO ALL CAUSES OF ACTION.

MR. LIRA: THANK YOU, YOUR HONOR.

MR. TAKAHASHI: THANK YOU, YOUR HONOR.

MR. SENIOR: THANK YOU VERY MUCH, YOUR HONOR.

THE COURT: WHO KNOWS, I MAY SEE YOU BACK.

MR. LIRA: WHO KNOWS, I AM NOT MAKING ANY PREDICTIONS. THAT IS THE REALITY OF THE CASE.

THE COURT: AND LET ME JUST SAY THIS OFF THE RECORD.

(DISCUSSION OFF THE RECORD)

MR. SENIOR: BACK ON THE RECORD.

THE COURT: YES. BACK ON THE RECORD.

MR. SENIOR: YOUR HONOR, I THINK WE HAVE A NOVEMBER 6TH TRIAL DATE.

THE COURT: OBVIOUSLY GOING TO VACATE THAT.

MR. SENIOR: OKAY.

MR. LIRA: THANK YOU, YOUR HONOR.

MR. TAKAHASHI: JUST ONE OTHER ISSUE, JUST REALLY WE [15] ATTACKED THE DECEDENT'S CLAIM, WE'VE GOT INDIVIDUAL CLAIMS THAT WE'RE PROBABLY GOING TO DISMISS FOR WAIVER OF COST. THAT WILL PROBABLY FOLLOW.

MR. LIRA: EXACTLY, AS TO THE OTHER TWO OCCUPANTS.

THE COURT: THAT WILL ALL WORK OUT.

MR. LIRA: YES. WE APPRECIATE IT.

THE COURT: THANK YOU VERY MUCH. IT WILL BE INTERESTING.

(END OF PROCEEDINGS)

* * *

[Reporter's Certificate Omitted In Printing]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
MINUTE ORDER
26-SEP-2006

Dept: C20 CENTRAL JUSTICE CENTER

Convened at: 1:30:00

Judge/Comm: MICHAEL BRENNER

Clerk: CORA BOLISAY

Bailiff: S. GRIMES

Reporter: KIMBERLY REX
CSR#663 8

Court Type: CIVIL

Court Category: WD – OTHER

Case Number: 04CC06494

Case Title: WILLIAMSON VS MAZDA MOTOR OF AMERICA INC

Doct Seq No: 107

Event: 654 MOTION TO STRIKE

Filing Party: MAZDA MOTOR OF AMERICA INC

683 DEMURRER TO AMENDED COMPLAINT

Filing Party: MAZDA MOTOR CORPORATION

Appearances:

Plaintiff Attorney: **GIRARDI AND KEESE, David R. Lira**

Defendant Attorney: **BOWMAN & BROOKE LLP,**
Julian G. Senior,
Brian Takahashi

Argument heard. Defendant's demurrer to 3rd amended complaint is sustained without leave to amend. Motion to Strike is moot. Entered: 09-26-2006/#13

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williams and Alexa Williamson,

Plaintiffs,

vs.

MAZDA MOTOR OF AMERICA, Inc, a California corporation; FORD MOTOR COMPANY, a Delaware corporation; AUTOMATIC

CASE NO. 04CC06494

Assigned: Hon. Michael Brenner
Department: C20

Date: September 26, 2006
Time: 1:30 p.m.
Dept.: "C20"

~~**[PROPOSED]**~~ **ORDER SUSTAINING DEMURRER TO PLAINTIFFS' THIRD AMENDED COMPLAINT**

(Filed Oct. 25, 2006)

EQUIPMENT MANUFACTURING COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive, Defendants.	))))))))	Action Filed: 7/07/04 Trial Date: 11/06/06 Motion Cutoff: 7/23/06 Discovery Cutoff: 7/08/06

The Demurrer of Defendants Mazda Motor Corporation and Mazda Motor of America, Inc. dba Mazda North American Operations came on regularly for hearing before this Court on September 26, 2006. Brian Takahashi and Julian G. Senior of Bowman and Brooke LLP appeared for Defendant and moving parties Mazda Motor Corporation and Mazda Motor of America, Inc. David Lira of Girardi & Keese appeared for plaintiffs.

After considering the moving, opposition reply papers, arguments of counsel, and all other matters presented to the court, and good cause appearing therefore, it is hereby ordered that the Mazda Defendants' Demurrer is sustained without leave to amend as to all of plaintiffs' claims arising out of the death of Thanh Williamson and judgment is rendered in favor of defendants Mazda Motor Corporation and Mazda Motor of America, Inc. dba Mazda North American Operations

IT IS SO ORDERED:

DATED: OCT 25 2006

/s/ Michael Brenner
JUDGE OF THE
SUPERIOR COURT
MICHAEL BRENNER

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williams [sic] and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, Inc, a California corporation; FORD MOTOR COMPANY, a Delaware corporation; AUTOMATIC	**CASE NO. 04CC06494** **Assigned: Hon. Michael Brenner** **Department: C20** Date: September 26, 2006 Time: 1:30 p.m. Dept.: "C20" ~~**[PROPOSED]**~~ **[AMENDED] ORDER SUSTAINING DEMURRER TO PLAINTIFFS' THIRD AMENDED COMPLAINT**

EQUIPMENT MANUFACTURING COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive, Defendants.	(Filed Feb. 07, 2007) Action Filed: 7/07/04 Trial Date: 11/06/06 Motion Cutoff: 7/23/06 Discovery Cutoff: 7/08/06

The Demurrer of Defendants Mazda Motor Corporation and Mazda Motor of America, Inc. dba Mazda North American Operations came on regularly for hearing before this Court on September 26, 2006. Brian Takahashi and Julian G. Senior of Bowman and Brooke LLP appeared for Defendant and moving parties Mazda Motor Corporation and Mazda Motor of America, Inc. David Lira of Girardi & Keese appeared for Plaintiffs.

After considering the moving, opposition reply papers, arguments of counsel, and all other matters presented to the court, and good cause appearing therefore, it is hereby ordered that the Mazda Defendants' Demurrer is sustained without leave to amend as to all of plaintiffs' claims arising out of the death of Thanh Williamson, as the plaintiffs have failed to state facts sufficient to constitute a cause of action with respect to those claims, and judgment is rendered in favor of defendants Mazda Motor Corporation and Mazda Motor of America, Inc. dba Mazda North American Operations

IT IS SO ORDERED.

DATED: FEB 07 2007

MICHAEL BRENNER

MICHAEL BRENNER
JUDGE OF THE
SUPERIOR COURT

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, INC., FORD MOTOR COMPANY,	**CASE NO. 04CC06494** Hon. Michael Brenner (Dept. C-20) **STIPULATION AND ~~{PROPOSED}~~ ORDER TO DISMISS PLAINTIFFS' REMAINING CLAIMS AND FOR ENTRY OF JUDGMENT** (Filed Jun 18, 2007) Complaint filed: July 7, 2004

AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, MAZDA MOTOR CORPORATION, and DOES 1-100, inclusive, Defendants.	Trial Date: August 7, 2006

TO THE COURT, ALL PARTIES, AND TO THEIR ATTORNEYS OF RECORD:

IT IS HEREBY STIPULATED by and between the parties through their respective attorneys as follows:

1. On February 7, 2007, the Court entered an Amended Order sustaining Defendant Mazda Motor Corporation's Demurrer to Plaintiffs' Third Amended Complaint. This Order dismissed, without leave to amend, all of Plaintiffs' claims arising out of the death of Thanh Williamson, including their wrongful death claims and *Dillon v. Legg* claims.

2. Plaintiffs' remaining claims arise out of their own personal injuries from the subject accident. As to those claims, the parties hereby stipulate to dismiss those claims with prejudice.

3. The parties also stipulate to defer the issue of recovery of costs arising out of Plaintiffs' claims until after Plaintiffs have resolved their appeal of this Judgment or the time to file an appeal has expired. With the permission of the Court, the parties agree to wait until after the matter has been remitted back to

the trial court, or until after the time to appeal has expired, before they seek their costs and/or to file motions to tax such costs.

4. Since the February 7, 2007 Order and the above-stated Stipulation completely dispose of this action, it is appropriate to enter Judgment in this matter.

DATED: May 14, 2007

GIRARDI | KEESE

/s/ [Illegible]
SHAHRAM A. SHAYESTEH
Attorneys for PLAINTIFFS
DELBERT WILLIAMSON,
ALEXA WILLIAMSON,
and ESTATE OF THANH
WILLIAMSON

DATED: May, ____, 2007

BOWMAN AND BROOKE LLP

ROBERT S. ROBINSON
Attorneys for Defendants
MAZDA MOTOR COR-
PORATION and MAZDA
MOTOR OF AMERICA, INC.

TO THE COURT, ALL PARTIES, AND TO THEIR ATTORNEYS OF RECORD:

IT IS HEREBY STIPULATED by and between the parties through their respective attorneys as follows:

1. On February 7, 2007, the Court entered an Amended Order sustaining Defendant Mazda Motor Corporation's Demurrer to Plaintiffs' Third Amended Complaint. This Order dismissed, without leave to amend, all of Plaintiffs' claims arising out of the death of Thanh Williamson, including their wrongful death claims and *Dillon v. Legg* claims.

2. Plaintiff's' remaining claims arise out of their own personal injuries from the subject accident. As to those claims, the parties hereby stipulate to dismiss those claims with prejudice.

3. The parties also stipulate to defer the issue of recovery of costs arising out of Plaintiffs' claims until after Plaintiffs have resolved their appeal of this judgment or the time to file an appeal has expired. With the permission of the Court, the parties agree to wait until after the matter has been remitted back to the trial court, or until alter the time to appeal has expired, before they seek their costs and/or to file motions to tax such costs.

4. Since the February 7, 2007 Order and the above-stated Stipulation completely dispose of this action, it is appropriate to enter Judgment in this matter.

DATED: May ___, 2007

GIRARDI | KEESE

SHAHRAM A. SHAYESTEH
Attorneys for PLAINTIFFS
DELBERT WILLIAMSON,
ALEXA WILLIAMSON,
and ESTATE OF THANH
WILLIAMSON

DATED: May, 14, 2007

BOWMAN AND BROOKE LLP

/s/ [Illegible]
ROBERT S. ROBINSON
Attorneys for Defendants
MAZDA MOTOR COR-
PORATION and MAZDA
MOTOR OF AMERICA, INC.

JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE STIPULATION AND DEFENDANTS ARE AWARDED THEIR COSTS IN THE AMOUNT OF $_____.__.

DATED: JUN 18 2007

MICHAEL BRENNER
Honorable Michael Brenner

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DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, INC., FORD MOTOR COMPANY,	**CASE NO. 04CC06494** Hon. Michael Brenner (Dept. C-20) ~~{PROPOSED}~~ **ORDER FOR ENTRY OF JUDGMENT** (Filed Jun 18, 2007) Complaint filed: July 7, 2004 Trial date: August 7, 2006

AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, MAZDA MOTOR CORPORATION, and DOES 1-100, inclusive,

Defendants.

Pursuant to stipulation of the parties and good cause appearing therefore,

IT IS HEREBY, ORDERED that judgment is hereby entered in accordance with the above Stipulation and that Defendants are awarded their costs in the amount of $ _____.____.

DATED: JUN 18 2007

MICHAEL BRENNER
Honorable Michael Brenner